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No. 11001.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JESSE M. CARNEY and MILTON GRADY RAMSEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

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No. 11001.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JESSE M. CARNEY and MILTON GRADY RAMSEY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

*To the Honorable United States Circuit Court of Appeals
for the Ninth Circuit:*

Your petitioners respectfully petition for rehearing on Count Two of the indictment, and as grounds for rehearing the defendants assign the following:

I.

The Court erred in its construction and interpretation of the Fourth and Fifth Amendments to the Constitution of the United States as applied to this case. The affidavit in support of the search warrant was insufficient.

II.

The court erred in holding that the defendant could not be prejudiced by the receipt of evidence of Count One of the indictment.

I.

(1) The court's position is, we think, erroneous: That no search warrant was necessary for the search of the *garage*. The Fourth Amendment does not separate searches on one's premises as distinguished between houses and garages.

The Fourth Amendment says:

“Amdt. 4. Security from unreasonable searches and seizures. The right of the people to be *secure* in their persons, houses, papers *and effects*, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*” (Italics ours.)

We think that “effects” include those in a garage as well as in his house.

The cases cited in the opinion also relate to liquor where “the odor coming from it were beer and the things seen in the buildings were such as are used in making beer.” These are distinguishable from the case where there are no odors to detect and nothing except an exploratory search for evidence, forbidden under the Fourth and Fifth Amendments. (*Marron v. United States.*)

We recognize that there are some decisions that hold that a garage has a different standing than a home. (*Earl v. United States*, 4 F. (2d) 532.) This case, however, was based upon a set of facts where an automobile was watched for bootleg liquor for several hours. The officers going into the garage saw the liquor, and the courts held that under the circumstances of that case no search warrant would have been necessary.

We find no case where the subject matter of the observations were innocent in and of themselves and in which the search has been upheld as lawful.

The language of the Fourth Amendment is "in their persons, houses, papers and effects," which would seem to be all inclusive and does not exclude a garage where one's effects may be kept.

The court also failed to point out in its opinion where the affidavits in support of the search warrant were sufficient to show probable cause to believe that the crime of counterfeiting was being committed and to name specifically *all* the articles seized under the warrant. Certainly the purchase of articles innocent in and of themselves does not give officers a right to conclude that they are being used for criminal purposes.

Nothing set out in the affidavits show any reasonable or probable cause to believe that the articles, to-wit: The press, the inks, etc., were to be used for any criminal purpose.

The return does not show the same articles set out in the affidavit [R. 23, 25, 27, 30].

B.

The Court Erred in Holding That the Affidavits Set Forth Sufficient Facts to Establish Probable Cause.

The test of whether there was or was not probable cause is whether there are sufficient facts in the affidavit which in and of themselves would be competent in the trial of the offense before a jury and would lead a man of prudence to believe that the offense of counterfeiting had been committed. (*Grau v. United States*, 287 U. S. 124-129, 77 L. Ed. 212.)

No. 11268.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRED STEIN and BERNARD STEIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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No. 11268.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN and BERNARD STEIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

Statement of Facts.

Appellee deems it advisable to make a statement of facts before proceeding to answer Appellants' Opening Brief.

The indictment, in one count, charged appellants Fred Stein and Bernard Stein, and one John L. Fisher who did not appeal, with violating 21 U. S. C., Section 174.

The date charged was "on or about September 14, 1945." The narcotics consisted of approximately fifty-six ounces of prepared smoking opium [R. 105-106].

Fred Stein and Marguerite Brander, his purported wife, had lived at 3930 Dixie Canyon Road since January of 1945, until their separation of September 11, 1945, Marguerite Brander going by the name of Mrs. Fred Stein [R. 115-116].

The eight cans of smoking opium were seized on this property, in the possession of Bernard Stein and John Fisher, on the night of September 14, 1945 [R. 275]. The eight cans of opium were wrapped in three separate packages.

Title to the property at 3930 Dixie Canyon Road, San Fernando Valley, had been taken in joint tenancy by the witness, Mrs. Marguerite Brander, as Mrs. Stein, and Fred Stein [R. 99 and 367]. Marguerite Brander and Fred Stein parted after their final quarrel, which was September 10 or 11, 1945 [R. 116].

Prior to the final quarrel between Mrs. Brander and Fred Stein and during the month of May, 1945, Mrs. Brander and Fred Stein had had a previous quarrel. While apart and on May 5, 1945, she had sent to Fred Stein a telegram [Defendants' Exhibit "C", R. 228]. Shortly after this date, they "talked it over and made up and went back together" [R. 261]. Mrs. Brander stated she had never received any money from Fred Stein [R. 262]. Marguerite Brander further testified that she at no time made any demand of Bernard Stein or Fred Stein for \$5000. Brander stated that about six weeks before she finally left (that is, about six weeks before September 11, 1945), and while she was sitting in Fred Stein's automobile in the metropolitan area of Los Angeles, Fred had handed her a sum of money, and Fred stated: "It is approximately \$30,000 and you take care of it." Fred then left the car, but later returned, and she then gave this money back to him [R. 364-365].

About three months prior to the final quarrel of September 11, 1945, the witness Brander had seen Fred Stein with a can similar to Government's Exhibit No. 1.

This was in the kitchen of their residence. Fred was taking some of the "black substance" out of the can, put it in a pan, put it on the stove and added water to it [R. 116-117 and 121]. Witness Brander stated the substance of the can she saw Fred Stein so preparing was a "black substance" [R. 117] similar in appearance to the substance from Government's Exhibit No. 1 [R. 119]; that he put it in a pan, added water and boiled it a short time, then put it into a bottle and put it in the ice box [R. 121]. Fred later told the witness such substance was opium and that he (Fred Stein) "had been on it for some time and that he couldn't quit" [R. 122]. Fred Stein also said if I (Mrs. Brander) didn't like the way he was living, the house had more than one exit and I could leave; that she pleaded with him to quit and he stated that she would never see any more of it around the house [R. 123].

Mrs. Brander stated she had seen Fred Stein pour this boiled substance from the bottle into a teaspoon and take it in the morning and at night, and that he did that about every day after the first episode that she observed [R. 126]. Brander stated that while Fred was boiling this black substance—"it had a very strong odor, a sweet, strong odor. I don't know how to explain it. I never smelled anything like it. It was different from anything I ever came in contact with before" [R. 127]. That upon occasions when she had worked in the garden and had first seen him boiling the substance, she had smelled this odor while in the garden [R. 128].

That upon another occasion before she finally left, she saw some pictures in a newspaper where some cans were displayed, which reflected that people were arrested for dealing in opium, and that in the picture the cans were

spread out on a table [R. 129]. That she had asked Fred what was in the cans and what it looked like, and he told her that it was a thick black substance. "He said it was smoking opium; it could also be taken" [R. 131]. After she had seen this picture she saw similar cans in their kitchen [R. 132]. That when she asked Fred Stein what it was, he told her—it was dope and that he was sorry she had found it out, but that he had been taking it for some time [R. 132].

That within the week before she left Fred Stein he continued to take the substance from a bottle about every day, or twice a day [R. 135].

That about September 8, 1945, she went into their garage, adjacent to their house, and found a box covered with leaves, which box was heavy. That upon emptying out the leaves, she found eight cans [R. 136-137]. That the cans were all closed but that the substance in them had leaked out and the object was messy. They were wrapped in newspapers and they were sticking together [R. 138]. Witness stated that the cans she found in the garage were similar to Exhibit No. 1 [R. 138-139].

Mrs. Brander first left these cans in the garage where she found them [R. 140-141]. A few days later she had a conversation with Fred Stein in the kitchen, where he took some of this "stuff," as he refers to it [R. 142]. That Fred Stein had also referred to "it" as "stuff" or "junk" [R. 142]. That on this day, either the 10th or 11th of September, when she saw him taking some of "this stuff," Fred Stein stated—"he had been on it too long and he wasn't going to get off now" [R. 145]. They had a quarrel and she left the house. A little while later she saw Fred Stein drive away, but first he threw some

things in the car that appeared to be women's clothing [R. 147-148]. That there was a note left on the door.

Mrs. Brander stated that the day she left (September 11, 1945), the day of the final quarrel, she put the eight cans in three different sacks and put them in different places on the premises [R. 151]. She made three packages of the eight cans [R. 152]. One package was placed behind the house under a little tree, the other in the garage in an old rug, the other one close to the incinerator [R. 152].

The concealment of the cans by the witness Brander did *not* take place three days after the final quarrel, as is stated by appellants on page 4 of their opening brief. This fact is additionally supported by the understanding of appellant Fred Stein's counsel, as reflected in his cross-examination of witness Brander [R. 240]:

“Q. By Mr. Lavine: As a matter of fact, you went down to the police department immediately after you saw Mr. Stein drive down the street, is that correct? A. Yes, sir.

Q. And at that time you didn't tell the police officers anything about any narcotics that you had hidden on the premises, did you? A. No, sir.

Q. You didn't tell them that you had secreted eight cans in three different places on those premises, did you? A. No, sir.”

Mrs. Brander went to the Police Department and returned and entered the house and ascertained that certain of her clothes had been removed. She then had a 'phone conversation with Fred Stein. The substance of the conversation was as follows [R. 155-156]:

“The Witness: I asked him what he did with my clothes and why he took them and he said he

took them because I took his stuff and I said, 'How do you know I took anything of yours?' and he said, 'Well, it was missing.' And he said he knew that I took it, so he says, 'You won't get your clothes until you give me my stuff.' He said, 'The people that have your clothes, the stuff belongs to them, * * *.'"

Brander stated she had other telephone conversations with Fred Stein and that Fred told her he was leaving her clothes in the hands of his brother Barney (Bernard Stein), and that she was to meet Barney and tell him where "—the 'stuff' is, or show him, and when he gets that, then he will give you your clothes" [R. 159].

Mrs. Brander testified to several telephone conversations thereafter had, both with Bernard Stein and John Fisher, a codefendant but not an appellant.

Bernard Stein is also frequently referred to as "Barney," John Fisher as "Johnnie," Fred Stein as "Freddie." Marguerite Brander was also called "Margo."

On one occasion, about September 13, 1945, during a telephone conversation, Mrs. Brander asked Bernard Stein for her clothes, to which Bernard Stein stated that she couldn't get the return of her clothes until he could return the "stuff" to the people to whom he stated it belonged [R. 163]. A similar such conversation was had with the codefendant Fisher [R. 169].

Witness Brander stated that on September 14, 1945 (the date Bernard Stein and John Fisher were arrested), the hour of about 7:30 p.m. was the first time she got in touch with Narcotic Agent Koehn, and later that evening was the first time she saw Narcotic Agent Davis [R.

168, 156]. Before talking to the Narcotic Agent Koehn, she had talked to Barney Stein and had agreed to meet Barney at the Dixie Canyon place. Bernard had said he would bring her clothes and she had told him she would show him where his "stuff" was [R. 168].

Mrs. Brander had neither seen nor talked to either Narcotic Agent until the night of September 14, 1945 [R. 168, 265].

Marguerite Brander, Narcotic Agent Koehn and his wife, on the evening of September 14, drove over to the Dixie Canyon residence. They were met there by Agent Davis. Brander showed Agent Davis where the three packages were [R. 172, 51]. Agent Davis concealed himself in the yard near the incinerator, awaiting the arrival of Bernard Stein and John Fisher [R. 50]. Agent Koehn had parked his car in the driveway of the Stein residence [R. 270].

Later that evening, Bernard Stein and John Fisher drove up to the Dixie Canyon property in John Fisher's car [R. 173]. They were introduced to Agent Koehn and his wife, Marguerite Brander introducing such persons as Mr. and Mrs. Anderson, friends of hers [R. 173].

Mrs. Brander stepped aside and talked to Barney and Johnnie, and was told by Johnnie in the presence of Barney that she, Margo, was to stay with Johnnie "—and give Barney the 'stuff,' as he is supposed to take it to this address to the people it belongs to, they are to open it and examine it and see if it has been molested in any way, and then he (Barney) will bring your clothes back to you" [R. 174].

Marguerite Brander then took Bernard Stein to the three places where the packages were concealed. Bernard picked each one up, "—smelled of it and pressed it," after which he stated, "this is all the eight cans" [R. 176]. Agent Davis, from his concealed place, as a flashlight was played upon them, saw Bernard pick up two of the objects [R. 51].

Barney carried all the packages but when he got near the light he dropped them [R. 176]. Barney explained his reason for dropping the packages, in that he was not going to take them in front of "these people" [R. 177]. A conversation ensued between Barney, Brander and Johnnie. Barney overcame his fear; he and John Fisher returned and picked up the packages. They then returned toward the car and shortly after were arrested by the agents, Barney being possessed of one package (of narcotics); Fisher, two packages (of narcotics) [R. 54, 275].

Agent Davis stated that he had no agreement with Marguerite Brander but had agreed with Agent Koehn that as soon as the two men had taken possession of the opium they would be placed under arrest [R. 76-77].

Government's Exhibit "4" (a small bottle containing a liquid), the chemist stated was a solution of opium containing yen she [R. 102]. This bottle and contents had been found by the witness Brander on September 15 in the Stein residence, in the kitchen cabinet [R. 193 to 196].

Agent Koehn stated the first time he saw Mrs. Brander was the night of the arrest, September 14, 1945. He saw her because he had received a call from her at the hour of about 6:00 p.m. that day [R. 265]. Fisher and

Bernard Stein drove up to the Dixie Canyon property about 10:30 the night of September 14 [R. 271].

Bernard Stein admitted having several telephone conversations with Mrs. Brander on and after September 12, 1945, with regard to her clothes and "articles" belonging to Fred Stein [R. 295]. He stated she had tried to get \$5000 [R. 297]. Bernard stated that the night of the arrest he parked his car away from the house because Mrs. Brander's clothes were in it, and drove up in Fisher's car. He did this because "—a wee bit suspicious she wasn't going to act in good faith, and I parked my car half a mile from Dixie Canyon and rode up to the house with Johnnie in his car" [R. 299, 309]. Bernard Stein admitted going with Brander and picking up the packages near a tree, near the incinerator, and in the garage [R. 301-302, 315].

Bernard Stein stated that he was going to return Mrs. Brander's clothes when he received back his brother Fred's articles which he described as—"an Elk's Pin," "Wristwatch," "Drapes," "Floor Radio," "Dishes," "Radio," a pair of "Binoculars," and "Whiskey" [R. 320]. Upon arriving at the Dixie Canyon residence, Bernard first went with Mrs. Brander and with the aid of a flashlight picked up three packages, two concealed in the yard and one in the garage. Bernard "smelled" of each package [R. 176].

At the trial Fred Stein was represented by Attorney Morris Lavine. Attorney Alfred F. MacDonald then represented Bernard Stein and John Fisher.

ARGUMENT.

I.

It Is Well Settled That the Charge to the Jury Must Be Considered as a Whole.

We commence our argument with this well settled principle, because appellants have devoted a great portion of their brief to either (a) the contention of error from the refusal to give certain proposed instructions, or (b) error in the instructions given. Appellee believes, that as this brief develops, it will appear that when the instructions are viewed in their entirety, no prejudicial error was made.

That the instructions must be considered in their entirety is well established.

To this effect:

United States v. Sorcey (C. C. A. 7th), 151 F. (2d) 899.

On page 901 appears the following:

“There is no requirement that any specifically framed charge be given if the general charge includes fair, comprehensive instructions upon the subject-matter involved, and in framing a charge upon the elements bearing upon credibility of witnesses, the court is not to be bound to a hard and fast formula as to each and every phase of his charge.”

Also, see:

Taylor v. United States (C. C. A. 9th), 142 F. (2d) 808, at p. 817; cert. den. 323 U. S. 723.

To the same effect:

Hargreaves v. United States (C. C. A. 9th), 75 F. (2d) 68, at p. 73; cert. den. 295 U. S. 759.

“It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. *Colt v. U. S.*, 190 F. 305, 308 (C. C. A. 8); *Michael v. U. S.*, 7 F. (2d) 865, 866 (C. C. A. 7).”

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. United States (C. C. A. 5th), 135 F. (2d) 353, at p. 355; cert. den. 320 U. S. 740.

“When we turn to the refused requests to charge, we must keep in mind that they are not to be considered abstractly or in *vacuo* as though the court had given no charge at all. They must be considered in their relation to the trial as a whole and especially in the light of the very full and fair general charge given, to which no exception was taken. In short, the refusal as to any of them may be regarded as reversible error if, but only if (1) it is in itself a correct charge; (2) it is not substantially covered in the main charge, and (3) it is on such a vital point in the case that the failure to give it deprived defendant of a defense or seriously impaired its effective presentation.”

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. United States (C. C. A. 9th), 132 F. (2d) 538; cert. den. 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction, to this effect:

Roubay v. United States (C. C. A. 9th), 115 F. (2d) 49.

A *narcotic* case of this Circuit which has been frequently quoted in other opinions and which discusses these general principles pertaining to sufficiency of instructions and the refusal to give certain specifically requested ones as not constituting error, is that of

Mullaney v. United States (C. C. A. 9th), 82 F. (2d) 638, at pp. 642 and 643.

We feel that the above authorities and the ones later to be referred to, when dealing with the specific subject matters appellants now complain of, such as entrapment, accomplice, personal possession of the narcotics, the date charged that the offense was committed, etc., clearly indicate that no reversible error was committed. This contention is especially true in view of the strong proof of the guilt of the appellants, the admissions made, and the settled rule that credibility is a matter solely for the jury's determination.

II.

The Issue of Entrapment Submitted to the Jury and Decided Adverse to the Appellants and the Instruction of the Court Upon This Principle of Law Was Ample, Fair and in Accordance With Law.

Commencing on page 9 of appellants' opening brief, also on page 27, on page 32, and again on page 36, various contentions with respect to the issue of ENTRAPMENT are presented. Again on page 41 of appellants' brief, they argue this same point with respect to Instructions "12" and "13," that were refused.

In this brief we shall endeavor to answer all of these contentions under this heading.

We do not believe that the evidence indicates that as a matter of law entrapment existed. Fred Stein could not contend that he was entrapped; he was not present when Bernard Stein and John Fisher were arrested on the night of September 14, 1945. The evidence is abundant to the effect that Bernard Stein and the codefendant (but not an appellant) John Fisher prearranged with Marguerite Brander to come out to the Dixie Canyon home and secure the "stuff," promising to give in return the clothes belonging to Marguerite Brander [R. 168 and 174].

The Narcotic Agents had not planted the opium; they were not advised until the evening of September 14, 1945, that any opium was on the premises. The Narcotic Agents had had no conversations with any of the defendants, or appellants here. The agents did not "entice," "persuade," or "induce" the appellants to engage in the commission of a crime just for the purpose of apprehend-

ing them. The action of the agents was watchful waiting. The acts of the Narcotic Agents were completely in accord with the language of the famous case of *Sorrells v. United States*, 287 U. S. 435, the often quoted case on the subject matter of *entrapment*.

We quote, from page 441:

“It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution. Artifice and stratagem may be employed to catch those engaged in criminal enterprises.” (Citing many authorities.)

We have no argument with the contention urged by appellants that Mrs. Brander, according to her own statements, was a woman of low character and we agree that “birds of a feather flock together.” We also recognize the scorn of a woman who has been frustrated. These contentions were very appropriate to have been urged before a jury; however, her credibility was likewise a matter for the jury to decide.

Rarely in a case of this character, or one involving the possession of illicit narcotics, can the Government entirely prove its case by people of fine repute. With the exception of agents, seldom do people of good reputation commingle with those handling narcotics. Of necessity, and as most of the reported cases will reveal, a major portion of the Government’s testimony comes from the mouths of persons who are informers or from persons who have been tainted by some form of unlawful association.

A. Discussion of 21 U. S. C. A., Sec. 173.

Appellants argue that in accordance with Title 21, Section 173 of U. S. C., once the Narcotic Agents became aware that narcotics had been concealed it was their immediate duty to seize the same. Such argument falls by its own weight, and also fails to recognize the purpose of this section. This section is one giving summary power for the immediate seizure of narcotics and drugs which had been imported or brought into the United States contrary to law, thereby avoiding the necessity of instituting forfeiture proceedings. This section does not, nor can it by implication be construed to mean that once a Narcotic Agent becomes aware of a cache of narcotics, that he is unable to wait and apprehend the person who may return to secure this illicit product. If such contention were sound, indeed would Narcotic Agents' hands be seriously shackled. We find no authority to support this contention. Appellants have cited none.

B. The Law of Entrapment More Fully Discussed.

As stated, the leading case on entrapment is:

Sorrells v. United States, 287 U. S. 435.

A rereading of the *Sorrells* case indicates the facts in that case to be entirely different from this case. It was a prohibition case. *Sorrells* was lured by the agent to commit a crime of which he was otherwise innocent. This was by repeated and persistent solicitations, by taking advantage of the sentiment aroused by reminiscences of their experience as companions in arms in the World War. See page 441 of *Sorrells* opinion.

The *Sorrells* case announces the well settled rule, as heretofore quoted, that artifice may be employed to catch those engaged in criminal enterprise and that the Government may afford opportunities which of itself will not defeat the prosecution.

The *Sorrells* case concludes by stating that the defense of entrapment was available and that the trial court erred by holding as a matter of law that there was no entrapment and in refusing to submit the issue of entrapment to the jury.

In the present case the issue of entrapment was submitted to the jury after full and complete instruction. The instruction on entrapment in the instant case consisted of two full pages of this printed record. See [R. 382 to 384]. A reading of the instruction given will illustrate that the issue of entrapment was fairly presented and was a correct exposition of the law on this subject.

The doctrine with respect to entrapment does not apply to a private citizen who is not an officer of the law. Such is the rule announced in the following case, involving *narcotics*.

Jindra v. United States (C. C. A. 5th), 69 F. (2d) 429, at p. 431; cert. den. 292 U. S. 651.

“Hammer testified positively that when he approached Jindra about narcotics he was not acting for the government officers nor under their instructions. Jindra’s counsel contended that the circumstances showed the contrary, and justified a charge on so-called entrapment. The court charged: ‘The defense of entrapment has been urged in this case. You are charged that while officers of the law have a right

and it is their duty to test out persons that they have reasonable grounds to believe are engaged in the violation of law, but no officer of the law has a right to go out and entice, persuade or induce a person who is otherwise innocent to engage in the commission of a crime just for the purpose of apprehending him and convicting him. It would be intolerable if officers of the law were permitted to engage in any such conduct, *but the Court is not aware of any rule of law which would extend that doctrine to a private citizen who is not an officer of the law.*' Exception was taken because 'the testimony reveals an agency for the Government.' The agency was not, however, a proven fact. The charge was abstractly correct." (Italics supplied.)

This Circuit has held, in a *narcotic* case:

Louie Hung v. United States (C. C. A. 9th), 111 F. (2d) 325.

When an officer does no more than furnish the appellant the opportunity of committing the offense, entrapment does not exist.

In the following cited *narcotic* case where the agent made several trips to the doctor's office with a drug addict or a decoy, the court pointed out that entrapment only exists when the Government's agents induce or originate the criminal intent of a defendant, and that there is none when the criminal intent is already present and the agent merely affords opportunity for the commission of the crime. To such effect see:

United States v. Abdallah, 149 F. (2d) 219; cert. den. 326 U. S. 724.

In the above case the court approved an instruction similar to the one given in the instant case and pointed

out that the jury's verdict negated the existence of the defense of entrapment.

For additional *narcotic* cases agreeing with the principles above announced and in conformity with the adequate instructions given by the trial court in the instant case, see:

United States v. Lindenfeld (C. C. A. 2d), 142 F. (2d) 829, at p. 831; cert. den. 323 U. S. 761;
Ratigan v. United States (C. C. A. 9th), 88 F. (2d) 919, at p. 922; cert. den. 301 U. S. 705; reh. den. 302 U. S. 774.

Also see:

Mitchell v. United States (C. C. A. 10th), 143 F. (2d) 953, at p. 957.

“There is no confusion as to the law of legal or illegal entrapment. The principle is well stated in *C. M. Spring Drug Co., et al. v. United States*, 8 Cir., 12 F. 2d 852, 856, where the court said: ‘It is well settled by the decisions of the Supreme Court of the United States, we think now universally followed in the several circuits, that, where the government, through its agents, has reasonable cause to believe that the law is being violated by the defendant, they may legally entrap the defendant by decoy letters or by pretended purchases.’ ”

To the same effect:

Farber v. United States (C. C. A. 9th), 114 F. (2d) 5, at p. 10; cert. den. 311 U. S. 706.

“It is claimed that appellant was entrapped and therefore the judgment should be reversed. This defense is applicable only where the officers instigate the crime charged and committed, but does not apply,

as here, where the officers discover the criminal in the doing of the crime which has already been instigated or already commenced or planned. See the leading case of *Sorrells v. United States*, 287 U. S. 435, 53 S. Ct. 210, 77 L. Ed. 413, 86 A. L. R. 249. To allow the defense of entrapment here would be to bar conviction wherever the Secret Service allowed the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime. The defense of entrapment is not here sustained."

C. Discussion of the Evidence With Respect to the Contention of Entrapment, and Specific Evidence of the Guilty Knowledge of the Appellants.

From the foregoing, first from a factual point of view, the officers had nothing to do with the concealing of the opium that the witness Brander had, on or about September 8, 1945, found in the garage adjacent to the premises where she and Fred Stein were living, which drug she concealed in three different places on the day of their final quarrel, namely, September 11, 1945.

The Narcotic Agents were first advised on the evening of September 14, that narcotics had been so concealed and, being alert, they went to the place of its concealment and waited until its possession was taken by Bernard Stein and John Fisher, and thereafter caused their arrest. The record is replete with admissions made by Bernard Stein, showing guilty knowledge. The following is but a portion of the evidence in illustration of his guilty knowledge: We refer to the telephone conversation he had with Marguerite Brander, in one of which he stated that Mrs. Brander couldn't receive the return of her clothes until he could return the

“stuff” to the people to whom he stated it belonged [R. 163]. He, Bernard Stein, had again talked to Marguerite Brander over the telephone and had agreed to meet her at the Dixie Canyon place, Bernard stating that he would bring her clothes and she had told him she would show him where his “stuff” was [R. 168]. When he arrived at the Dixie Canyon residence on the night in question, in the presence of the codefendant Fisher, Brander was told to give Bernard Stein the “stuff,” it was to be taken to the people to whom it supposedly belonged, they were to open it and examine it and see if it had been molested and if not then he, Bernard Stein, would bring the clothes back to Mrs. Brander [R. 174]. When Bernard Stein accompanied Mrs. Brander to the three places where the packages had been placed, a flashlight was used. He picked each package up, “—smelled of it and pressed it,” after which he stated: “This is all of the eight cans” [R. 176]. He also showed guilty knowledge by dropping the packages when he was returning toward the place where Agent Koehn had parked his car [R. 177].

Bernard Stein tried to excuse his acts by stating he only intended to go after articles that Mrs. Brander had which belonged to his brother, and that upon their return he intended to give her her clothes although he did not then even have her clothes with him; they were parked in his car over half a mile away. Despite this shallow explanation he was willing to go to the three places where the packages were hidden [R. 315], although the articles he

tried to explain that he intended to return to his brother were such things as an Elk's Pin, Wrist Watch, Drapes, Floor Radio, Dishes, etc. [R. 320]. It is hard to see how he expected to find such articles concealed about the yard.

The evidence with respect to Fred Stein's guilty knowledge and possession is abundantly established by the testimony of Marguerite Brander, both with respect to his use of the substance of a similar character to that found in the eight opium cans, his boiling the substance in water, his telling her (Mrs. Brander) that it was "dope" [R. 132], his admission that he took it [R. 122], his use of it [R. 142], his reference to the opium as "stuff," or "junk" [R. 142], and his admission that he was taking opium [R. 145].

Fred Stein's guilty knowledge is further inferentially supported by his sudden leaving on September 11, 1945. The only proper inference that can be drawn is that he had ascertained that his eight cans of opium were missing from the garage, he was suspicious and fearful, his sudden departure was somewhat in the nature of flight. He then caused Mrs. Brander to deal through his brother, Bernard Stein, and John Fisher, hoping to get the return of his opium in exchange for the clothing of Marguerite Brander which he had taken away on September 11.

From the foregoing it appears that the court's instruction on the subject of *entrapment*, as is reflected [R. 382 to 384], was proper and adequate and that it is of no moment that a private person motivate the assistance of officers if in fact entrapment as the authorities state did not exist.

III.

The Evidence Was Clearly Sufficient to Justify the Verdict, and the Verdict Is Supported by the Law and the Evidence.

On page 15 of their brief, appellants argue that there was no showing that Fred Stein ever received or concealed or facilitated the transportation of the eight cans of opium. As heretofore indicated, this opium was first discovered by Marguerite Brander on September 8, 1945, in the garage adjacent to the home in which she and Fred Stein were living [R. 136-137]. In the preceding pages we have noted considerable evidence showing guilty knowledge and admissions upon the part of Fred Stein of his possession of opium and his admission of using it.

The testimony indicates that Marguerite Brander concealed these eight cans in three separate packages upon the premises, in three different places, on the day that she and Fred Stein finally parted, namely, September 11, 1945 [R. 151-152, 155-156, and 240].

It is but logical that she concealed them prior to Fred Stein's departure with her clothing. Otherwise, why did he so suddenly depart? The only proper inference that can be drawn is that when Fred Stein noted the disappearance of his eight cans of opium he decided to *get even* with Mrs. Brander by taking her clothes, thereby expecting to cause her to return his opium in return for her clothes.

A. Discussion of Well-settled Rules Governing Appeals.

It is well settled that the sufficiency of the evidence is generally a jury question. Fairly recent cases on this proposition are:

Hamphill v. United States (C. C. A. 9th), 120 F. (2d) 115, cert. den. 314 U. S. 627;

Yoffee v. United States (C. C. A. 1st), 153 F. (2d) 570.

It is also well settled that the fact that the Appellate Court might have reached a different conclusion from that of the jury on certain questions involved will not justify the Appellate Court substituting its views on the weight of the evidence for those of the jury. To this effect:

Jordan v. United States (C. A. D. C.), 87 F. (2d) 64, at p. 67.

It is also established that the Appellate Courts will consider the evidence most favorable to the prosecution and will indulge all reasonable presumption in support of the trial court's rulings and draw all inferences permissible from the record, in determining whether evidence is sufficient to sustain a conviction.

A late case from this Circuit, to such effect, is:

Henderson v. United States (C. C. A. 9th), 143 F. (2d) 681.

IV.

The Court Did Not Err in the Admission of and
Exclusion of Evidence in This Case.

A. The Prosecutor Did Not Commit Misconduct.

On page 17 of Appellants' Brief, the contention is urged that misconduct was had on the part of the Government's counsel in the asking of certain questions of the Narcotic Agent Davis. Appellants have also set forth such evidence and proceedings in the footnote.

It is submitted that the questions complained of were merely preliminary questions. They were also asked for the purpose of establishing identity of the defendants. It should be observed that the jury was promptly admonished to disregard the questions and the answers. Even though this type of interrogation might not have been directly to point, the court's admonition to disregard same corrected any possible error. Counsel for appellant did not see fit to submit an instruction upon this point. This preliminary line of interrogation was not prejudicial. No effort was made to bring out any past record upon the part of any of the defendants, nor of their previous connection with narcotics.

Appellants rely upon the cases of *Viereck v. United States*, 318 U. S. 236, and *Berger v. United States*, 295 U. S. 78.

Neither the *Viereck* nor the *Berger* case are to point. Both of these cases chiefly involve repeated and persistent inflammatory *arguments* of a highly prejudicial nature. In the *Viereck* case the closing remarks of the prosecutor were not appropriate to the evidence and they could have only been made to arouse passion and prejudice at a time

when we were then at war. Note page 247 of the *Viereck* opinion.

The *Berger* case, likewise, was an extreme case of improper argument coupled with a most abusive character of interrogations. The court held that the reversal would not have been granted except that the case was otherwise weak. A rereading of both of these cases will clearly show that both the interrogations in the *Berger* case and the caustic arguments in both of these cases are not parallel to the complaint urged in the instant case. The following rule is announced in the *Berger* case:

We quote from page 89:

“Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”

In the instant case there was no follow-up by the prosecutor; no complaint is made that his arguments were prejudicial. It is submitted that this is an effort to seize upon a highly technical objection of a slight error, if any, that was cured by the court's admonition; the grasping of a straw, hoping to acquit appellants whose guilt was abundantly established.

The correct law which applies to this alleged misconduct, if any did in fact exist, is the following:

Sandquist v. United States (C. C. A. 10th), 115 F. (2d) 510.

In the *Sandquist* case certain improper questions had been asked which, it was contended, were improper and

which tended to incite and inflame and prejudice the jury. The court sustained the objections and they were not answered.

The court states, on page 512, as follows:

“A trial in a court is not a contest between opposing attorneys. It is not a battle of wits. Courts are established to administer the laws of the land fairly and impartially, to the end that justice and right may prevail. To accomplish this, rules of procedure are adopted to guide the court, attorneys, witnesses and the jury. Some transgressions of the rules are bound to occur in the course of a heated trial. It is not every violation of the rules that entitles one to a new trial. Technical violations that do not substantially affect the merits will be disregarded by an appellate court and do not constitute grounds for reversal. It is only when it fairly appears that an error occurring in the trial may have substantially affected the rights of a defendant or contributed to a miscarriage of justice that an appellate court is justified in interposing and ordering a new trial. 28 U. S. C. A. § 391; *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314.”

In the *narcotic* case hereinafter noted, questions of rather serious implications were improperly asked; they were objected to and stricken. The court pointed out the admonition by the court to disregard the questions as though they had never been asked, and the court sustaining the other objections cured the prejudicial effect of such questions and the implication therein contained. To this effect:

United States v. Ginsberg (C. C. A. 7th), 96 F. (2d) 882; cert. den. 305 U. S. 620.

In *another* narcotic case hereinunder cited, the court pointed out that it was not prejudicial error or misconduct for the prosecution to lay a foundation for the admission of evidence which is later excluded on objection. This case involved questions pertaining to a spoon, the admission of which was later excluded. To this effect see:

Schmidtberger v. United States (C. C. A. 8th),
129 F. (2d) 390.

It is the general rule, and authorities hereinunder noted support the same, that even the asking of an erroneous question presents no reversible error when the same is objected to and the Trial Court instructs the jury to disregard same. For cases to this effect pertaining to *narcotics*, see the following:

Stahl v. United States (C. C. A. 8th), 144 F. (2d)
909, at pp. 912, 913.

In the *Stahl* case several objectionable questions were asked of the doctor, the defendant, who was charged with a narcotic violation. Objections were promptly sustained and the jury instructed to disregard same. The court held that this was sufficient to cure the error.

In:

United States v. Cohen (C. C. A. 2nd), 124 F.
(2d) 164, at p. 167,

—an improper question was asked but it remained unanswered. The judge stated that it had nothing to do with the issues. The Circuit held that such question and another similar line of questioning was not cause for reversal.

Lusco v. United States (C. C. A. 2d), 287 Fed. 69.

In the *Lusco* case questions were asked by the court which carried an implication, but the jury was instructed to disregard any such implication.

A very fair consideration of the subject matter of alleged misconduct is reflected in the Supreme Court opinion of:

United States v. Socony-Vacuum Oil Company,
310 U. S. 151, comm. p. 237.

We particularly call this Court's attention to the language noted on pages 238 and 239; also to page 243:

"As stated in *Dunlop v. United States*, 165 U. S. 486, 498: 'If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand'."

This Circuit has observed:

McDonough v. United States (C. C. A. 9th), 299 Fed. 30.

"It is only in exceptional instances that each withdrawal does not cure the error."

Dubrin v. United States (C. C. A. 2d), 93 F. (2d) 499, at p. 506.

"The situation in the case at bar is quite different from that in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314. The government's proof there was much weaker, the acts of its counsel were persistently objectionable, and the court failed to exert any such control over the trial as Judge Knox exercised here. *The attempt to turn this trial of men whose guilt was abundantly proved into a trial of*

government's counsel, though a not infrequent expedient of defendants who have no other recourse, ought not, in our opinion, to succeed." (Italics supplied.)

Also note:

United States v. Weiss (C. C. A. 2d), 103 F. (2d) 348, at pp. 354-55;

Pietch v. United States (C. C. A. 10th), 110 F. (2d) 817; cert. den. 310 U. S. 648.

B. Evidence Concerning Prior Relationship With Narcotics and Its Use Was Pertinent and Properly Admitted.

This is in answer to the contentions urged commencing on page 19 of appellants' brief.

The general rule is that evidence of other acts or crimes is not admissible because it is both too remote and too prejudicial.

There are, however, important and well-established exceptions which permit evidence of similar acts for the purpose of showing intent, purpose, design and knowledge, or to rebut the inference of mistake or innocent intent.

The authorities cited hereinunder clearly recognize such exception.

Gianotos v. United States (C. C. A. 9th), 104 F. (2d) 929, at pp. 932, 933.

In the *Gianotos* case, a *narcotic* case, a conviction was had under this same statute. Appellant assigned as error the admission in evidence as to the smuggling of opium by Thomas and appellant some *three* months prior to the commission of the offense set out in the indictment. This

evidence pertained to conversations on the Steamship "Monterey" on a southbound trip to Australia (see page 931 of the above citation).

Appellant argued that evidence of offenses, other than those charged in the indictment, could not be introduced for purpose of proving the charge laid in the indictment. This Circuit Court held to the contrary as follows (page 932):

"However, there are a number of well-recognized exceptions to the rule excluding evidence of other offenses and these exceptions are founded on as much wisdom and justice as the rule itself. Here we concern ourselves with but one of these exceptions. 'It often happens that two distinct offenses are so inseparably connected that the proof of one necessarily involves proving the other, and in such a case, on a prosecution for one, evidence proving it cannot be excluded because it also proves the other.' 16 C. J. § 1134, p. 588."

Page 933:

"* * * Appellant, thus, by his own acts connected the former crime with this crime which made the testimony admissible for its bearing on the crime under investigation. The applicable rule of law is thus summarized: 'In proving a crime, all the *res geste* may always be shown, though it involve proof or evidence concerning the commission of another and independent crime by the defendant at the same time.' 10 R. C. L. §§ 107-109, p. 940. The admission of this evidence was not error."

More recently, this Circuit held in—

Henderson v. United States (C. C. A. 9th), 143 F. (2d) 681—in substance as follows:

In the *Henderson* case a Chairman of a Rationing Board was charged with unlawfully embezzling certain gasoline ration coupons.

This Court approved the admission of evidence of previous sales and possession of large quantities of gasoline coupons by the defendant on other occasions, although not set forth in the indictment.

On page 683 of the *Henderson* case we see reference to a case which we believe is quite familiar to appellants' counsel, namely, that of *People v. Lisenba*, 14 Cal. (2d) 403, 94 P. (2d) 569, 579-584; aff. 314 U. S. 219 (*Lisenba v. California*).

In the *Lisenba* case the defendant was convicted of the murder of his wife upon whose life he had a large insurance policy. The court permitted evidence showing the death of a previous wife under suspicious circumstances, on whose life the defendant also had a large insurance policy, although many years' intervened between the two deaths.

In the instant case the Government introduced evidence showing the use of a similar product by the defendant Fred Stein, at a period within a short time prior to the date charged [R. 116-117 and 135]. The Government also introduced evidence of conversations showing admissions on the part of Fred Stein, of the use of narcotics [R. 132]. The Government also introduced additional evidence of similar character. This evidence was introduced on the theory that it showed intent, purpose and

knowledge. It is submitted that it is but logical and far more likely that a person who had used and had admitted using such narcotics would have had possession of it as of on or about the date charged. Such evidence was pertinent and proper. It is noted that all of this character of evidence was within three months prior to the specific date charged [R. 116].

Additional cases supporting this principle are the following:

United States v. Cohen (C. C. A. 2d), 124 F. (2d) 164; cert. den. 315 U. S. 811 (*Bernstein v. U. S.*)

The *Cohen* case was also a *narcotic* case. In it the court allowed proof of the manufacture and sale at a prior time, pointing out that such manufacture and sale necessarily tended to prove possession for the purpose of a later sale under which the defendants were being tried.

Morris v. United States (C. C. A. 5th), 123 F. (2d) 957.

In the *Morris* case, a *narcotic* case, other previous sales of paregoric were allowed to be shown on the question of intent and good faith.

Williams v. United States (C. C. A. 5th), 294 Fed. 682.

The court permitted testimony of the doctor's previous sale of narcotics to an addict, on the issue of knowledge.

For additional cases allowing such evidence for the purpose of showing plan, scheme, design and guilty knowledge, we cite without comment the following:

Tomlinson v. United States (C. C. A., D. C.), 93 F. (2d) 652, 654; cert. den. 303 U. S. 646;

Williamson v. United States, 207 U. S. 425, 450-451;

Tedesco v. United States (C. C. A. 9th), 118 F. (2d) 737, 739-741.

* * * * *

The exception to the general rule regarding evidence of other offenses also allows the introduction of other acts relied upon to show intent or plan which occurred *after* the acts alleged in the indictment.

Shreve v. United States (C. C. A. 9th), 104 F. (2d) 796, 803, cert. den. 308 U. S. 570;

Morris v. United States (C. C. A. 5th), 112 F. (2d) 522, 528-529, cert. den. 311 U. S. 653.

The last two cases are cited primarily as additional support for the introduction of Government's Exhibit "4," a small bottle containing a liquid that was testified to having been found on September 15, 1945, in the kitchen cabinet of the home whose legal title was jointly held by the witness Mrs. Brander, under the name of Mrs. Fred Stein, and the defendant Fred Stein. This bottle contained a solution of opium, yen she.

C. There Was No Error in the Introduction of Government's Exhibit No. 4, a Small Bottle Containing a Solution of Opium, Yen She.

This bottle was found in the kitchen cabinet of the Dixie Cayon residence on September 15, 1945. The same was found by the witness, Mrs. Brander, when she was accompanied by Narcotic Agents [R. 193 to 196].

There is no dispute, or no evidence to the contrary, of the fact that Mrs. Brander, under the name of Mrs. Stein, held joint title to this property at Dixie Cayon. Even the previous owner so testified [R. 98-99].

There was no unlawful search or seizure involved in Mrs. Brander locating this bottle and contents in the property which title was in her joint name [Government's Exhibit No. 4].

In our opinion a recent case of the Supreme Court, together with the uncontroverted factual matters of this case, clearly show that the obtaining and introduction into evidence of Government's Exhibit No. 4 did not constitute unlawful search or seizure.

See:

George Harris v. United States, dec. by S. Ct. May 5, 1947, 15 L. Wk. 4492, 331 U. S. 145.

Also see:

United States v. Kronenberg (C. C. A. 2d), 134 F. (2d) 483.

It is true that the indictment does not charge the defendants with the possession of this particular small bottle, however, such evidence was admissible on the question of intent and guilty knowledge, as supported by the authorities noted in the previous subheading.

It should not be overlooked that the uncontradicted testimony was to the effect that Fred Stein, in this same home had taken, by teaspoon, a substance which he prepared and which he had kept in a bottle [R. 126]; Fred Stein admitted the taking of opium [R. 132]. There is considerable testimony of a similar nature.

It is true that no evidence was introduced to show Bernard Stein's connection with Government's Exhibit No. 4; however, at time of trial Bernard Stein was represented by a different attorney than he is represented by in this appeal. His attorney at time of trial was content to make no objection to the introduction of Government's Exhibit No. 4 [R. 196].

If the evidence against Bernard Stein was otherwise weak, which it is not, there might be some merit to his present complaint; however, the evidence is strong as to his guilty knowledge with respect to the eight cans of smoking opium, some of which were found in his possession on the date of his arrest.

D. Possession May Be Constructive, It Need Not Necessarily Be Personal or Immediate.

THE EVIDENCE CLEARLY ESTABLISHED GUILTY KNOWLEDGE IN THE POSSESSION OF THE OPIUM INVOLVED.

Appellant argues contrary to the contention set forth in the above subheadings.

It shall be our endeavor to treat appellants' contentions on this and related subjects as a unit.

We refer to Appellants' Opening Brief.

On page 22, with respect to their refused instruction No. 15, again on page 25 with respect to their refused

instructions Nos. 16 and 19, and on page 42 where their refused instruction No. 15 is repeated, and finally on pages 43 and 44 do appellants argue that error was committed with regard to the charge concerning possession of the narcotics.

The refused instruction No. 15 (Appellants' Brief, pp. 22-23 and 42), so far as it sought to charge the jury that the possession "was personal," was erroneous. The latter part of this charge regarding "conscious assertion of possession" was fully covered in other charges to the jury [R. 380-381].

This particular instruction sought to have the jury advised that the possession of the narcotics must be *personal*. Such is not the law.

This instruction (Defendants' Refused No. 15) overlooks two well-settled principles of Federal law. The law provides for constructive possession, and by statute and the numerous cases construing same an "aider or abettor" is equally guilty with a principal (Title 18 U. S. C., Section 550).

The law is well settled that the possession of opium need not be personal or immediate; possession may be constructive.

Narcotic cases definitely establishing the principle that possession may be constructive, and that one who even *facilitates* the possession is equally guilty, are the following:

Pon Wing Quong v. United States (C. C. A. 9th),
111 F. (2d) 751.

In the *Pon Wing Quong* case, this court approved on pp. 757-58, the reading to the jury of the definition as

is reflected in 18 U. S. C., 550, the “aiding and abetting” statute. This court pointed out, on page 756, that the word “facilitate” had the common ordinary definition. The *Pon Wing Quong* case pertained to the fastening of a custom label or “sticker” on a trunk containing opium, for the purpose of preventing inspection of the trunk. Appellant was an employee of the Canadian Express Company. The trunk had been on the ship SS “President Coolidge,” which docked in San Francisco, from China. Conviction of violating 21 U. S. C. 174, the same section under which the instant charge was brought, was held to have been established by the above act. This act of attaching the sticker amounted to “facilitation.” This court pointed out, on page 758, that by reason of the statute making one guilty of aiding and abetting a crime equally guilty with the principal (18 U. S. C., 550), the appellant was properly found guilty, and stated:

“Possession of the opium, as that expression is commonly understood, is in neither case a requisite of guilt.”

See, also:

Borgfeldt v. United States (C. C. A. 9th), 67 F. (2d) 967.

In the *Borgfeldt* case the court specifically stated that an instruction to the effect that the possession contemplated by the statute must be “personal and exclusive” was *not* correct, and that the Government need not show that the morphine was actually concealed by the defendant (see page 969).

Another *narcotic* case to the same effect:

United States v. Cohen (C. C. A. 2d), 124 F. (2d) 164; cert. den., 315 U. S. 811 (*Bernstein v. U. S.*).

In the *Cohen* case, four defendants were convicted of concealing and facilitating concealment of morphine. The court stated, on page 165, as follows:

“The defendants were all convicted upon both counts and each has appealed. Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. *United States v. Hodorowicz*, 7 Cir., 105 F. 2d 218, 220, certiorari denied, 308 U. S. 584, 60 S. Ct. 108, 84 L. Ed. 489; *Vilson v. United States*, 9 Cir., 61 F. 2d 901.”

An additional *narcotic* case is:

Mullaney v. United States (C. C. A. 9th), 82 F. (2d) 638.

In the *Mullaney* case the court, on page 642, discusses a charge with relation to accomplices, and points out that by reason of 18 U. S. C. A., 550, the distinction between principals and accessories has been abolished. On pages 642 and 643, in discussing instructions which are rather similar to the ones given in the instant case, the court pointed out, particularly on page 642, that an instruction requiring that possession must be “personal and exclusive,” was not correct.

Additional *narcotic* cases to the same effect are the following:

Rosenberg v. United States (C. C. A. 9th), 13 F. (2d) 369;

Willmering v. United States (C. C. A. 5th), 4 F. (2d) 209;

United States v. Kronenberg (C. C. A. 2d), 134 F. (2d) 483.

We hesitate to repeat the instructions given because we feel we have covered all points urged. It is, however, noteworthy to point out certain of the instructions which specifically advised the jury what they must first find, should they find the defendants guilty. The court gave the correct instruction respecting the possession required [R. 375].

The last three paragraphs reflected on page 379 of the transcript fairly apprised the jury that before the defendants could be found guilty of possession they must have guilty knowledge, and that if the defendants were innocent of the knowledge or contents of the cans, or if there was any reasonable doubt on this proposition, they should be found not guilty.

A similar such charge is to be noted [R. 380], the second paragraph. The court gave the following very proper instructions on the question of guilty knowledge and possession [R. 381]:

“You are instructed that one of the essential elements (428) of the charge in this case is guilty knowledge of the accused and such guilty knowledge cannot be presumed, but must be proved like the other facts in the case, beyond a reasonable doubt and to

a moral certainty, and unless the Government proves such guilty knowledge beyond a reasonable doubt and to a moral certainty, you must acquit the accused.”

“You are instructed that you cannot draw any inferences of possession or concealment of the opium in question merely because of the location where it was found. It is incumbent upon the Government to prove knowledge on the part of the alleged possessor, or you must acquit the accused.”

E. There Was No Error in the Instruction Given by the Court With Respect to the Date the Offense Was Alleged to Have Been Committed [R. 374].

On page 29 of Appellants’ Opening Brief, they set forth the instruction given by the court with respect to the date charged in the indictment.

A similar such complaint is made on pages 38 and 45, on the contention of the specific date. We shall endeavor to answer all of these contentions under this one sub-heading.

This instruction, as given, was correct. It points out that the Government is not required to set forth the exact date on which the crime was committed, and concludes: “—at a date reasonably close to the date specifically charged.” The general rule involving a crime of this character is that it is sufficient to allege that an offense is committed “on or about” a certain date, or any date so long as it is within the period of limitation. Ordinarily, the precise date is not material so long as the evidence shows that the offense was committed before the finding of the indictment and within the period of limitation. A

variance as to date is ordinarily not fatal. Cases supporting the foregoing are the following:

Hale v. United States (C. C. A. 5th), 149 F. (2d) 401, at p. 403; cert. den., 326 U. S. 732.

In the *Hale* case, pertaining to liquor, the court held that there was no material variance in proving a sale on July 8, under a count charging the doing of business on or about August 8.

Winslett v. United States (C. C. A. 5th), 124 F. (2d) 302.

In the *Winslett* case, the date charged in the indictment was November 2, although most of the evidence referred to acts committed the preceding July. The court held that this was not fatal.

We quote, page 303:

“* * * It has been held too often to require more than a reference to one or two authorities, that the date of an alleged offense as stated in the indictment is not binding so as to limit the proof to that specific date; and that under an allegation like that in the indictment, the proof may fix the offense on any date within the bar of the Statute of Limitations. The evidence was ample to support the conviction.”

To the same effect, see the following:

Peterson v. United States (C. C. A. 9th), 4 F. (2d) 702.

In the *Peterson* case, a prosecution for maintaining a common nuisance justified evidence of sales of liquor upon the premises shortly before the date alleged. The court pointed out that the allegation in the indictment of a certain date does not limit proof to that date.

See also:

Weeks v. Zerbst (C. C. A. 10th), 85 F. (2d) 996;
Cornett v. United States (C. C. A. 8th), 7 F. (2d)
531.

F. The Presumption Contained in Section 174, Title 21 U. S. C., Is Not in Violation of the Fifth Amendment to the Constitution.

Appellants raise a similar contention on page 33, and also on page 30, of their Opening Brief. We shall answer these contentions under this one heading. This attack with respect to the explanation required, once possession of narcotics has been shown, as is provided for by statute 21 U. S. C., 174, has frequently but never successfully been sustained by the Federal Courts.

This Circuit has recently decided this same question adverse to appellant's present position.

Gonzales v. United States (C. C. A. 9th), 162 F. (2d) 870 (June 20, 1947).

Page 871:

"The point was inherent in the case of *Yee Hem v. United States*, 1925, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904. There the point was approached through a claim that the presumption of guilt, unless possession was explained to the satisfaction of the jury, in effect, made a defendant a witness against himself. The court, 268 U. S. at page 184, 45 S. Ct. at page 471, 69 L. Ed. 904, said: 'The legislative provisions here assailed satisfy * * * requirements in respect of due process. They have been upheld against similar attacks, without exception so far as we are advised, by the lower federal courts. *Charley Toy v. United States* (2 Cir.), 266 F. 326, 329; *Gee Woe v. United States* (5 Cir.), 250 F. 428;

Ng Choy Fong v. United States (9 Cir.), 245 F. 305; United States v. Yee Fing, D. C., 222 F. 154; United States v. Ah Hung, D. C., 243 F. 762, 764. We think it is not an illogical inference that opium, found in this country more than four years * * * after its importation had been prohibited, was unlawfully imported. Nor do we think the further provision, that possession of such opium in the absence of a satisfactory explanation shall create a presumption of guilt, is 'so unreasonable as to be a purely arbitrary mandate.' By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress."

In addition to the foregoing, other *narcotic* cases where the same matter has been passed upon adverse to appellant, are the following:

Mullaney v. United States (C. C. A. 9th), 82 F. (2d) 638;

United States v. Moe Liss (C. C. A. 2d), 105 F. (2d) 144;

Copperthwaite v. United States (C. C. A. 6th), 37 F. (2d) 846.

G. A Rejection of Defendants' Instruction No. 16 Was Proper, and Not Error.

On page 43 of Appellants' Brief is the refused instruction No. 16, which argues that the garage in question was open to anyone who chose to enter, and the assertion that the evidence must show that the defendant had personally secreted or transported the specific narcotics. The essential and correct principles embodied in this instruction were adequately covered by other charges given to the jury.

In this connection we refer, also, to page 32 of Appellants' Brief, wherein they quote in part the instruction the court gave on the question of "aiders and abettors."

We design to answer these enumerated points under this one subheading.

On page 32, appellants cite *United States v. Falcone*, 109 F. (2d) 579, also reported in 311 U. S. 205. It is difficult to see the application of the *Falcone* case to the instant case. The *Falcone* case reversed the conviction of one charged with conspiracy that he, as a wholesaler, had supplied sugar yeast and cans out of which alcohol was illicitly distilled. Falcone, as a jobber, sold his sugar to grocers who in turn sold to the distillers. The court held that it must be shown that Falcone either in some sense promoted their venture, or made it his own, or had a stake in its outcome before he could be guilty as a conspirator or an abettor. There was no showing that the jobber promoted or was in any wise connected with the utilization of these legal products in the unlawful distillation carried on by the other conspirators. The *Falcone* case, by comparison, does no more than say that an automobile dealer is not responsible for the acts of a

gangster, merely because he sells him a high-powered car which is later used as a medium of a gangster's unlawful enterprise.

A case more nearly at point on the question of aiding and abetting is the following very recent case.

Bossa v. United States, 330 U. S. 160 (February 1947).

The *Bossa* case was likewise a prosecution brought under the Internal Revenue laws, in connection with the operations of a still. The pertinent portion of the *Bossa* case, so far as it pertains to the "aiding and abetting" statute, is quoted hereinunder:

Page 164:

"We think there was adequate evidence to support a finding of guilt on the first count which charged operation of the business of distilling to defraud the Government of taxes. There was certainly ample evidence to show that Chirichillo carried on the business of a distiller and that the petitioner helped him to do it. 18 U. S. C. § 550 provides that one who aids and abets another to commit a crime is guilty as a principal. Consequently, the jury had a right to find, as it did, that the petitioner and Chirichillo were equally guilty of operating the business of the distillery. See *United States v. Johnson*, 319 U. S. 503, 515, 518."

On page 32 of Appellant's Brief, they only quote a portion of the court's charge with respect to the subject-matter of "aiding and abetting." The court gave a fairly lengthy and fully explanatory charge upon this principle of law [Note R. 378-379].

The other phase of appellants' complaint closely allied to this point, as treated on page 43 of their brief, was adequately covered by the instructions the court gave. As noted [R. 379], the court charged that where a defendant was innocent of the knowledge of the contents of the cans, or where the jury had reasonable doubt as to whether such knowledge had been proved, such defendant should be found not guilty.

The court also stated as follows [R. 380]:

“Before a presumption of guilt can arise against Fred Stein in this case, it must be shown by the government that (427) he possessed it or had possessed it, and that he knew of the particular narcotics which were in the cans, in addition to all of the elements concerning which I have heretofore instructed you.”

The court again went into this matter [R. 381], and among other things gave the following specific instruction:

“You are instructed that you cannot draw any inferences of possession or concealment of the opium in question merely because of the location where it was found. It is incumbent upon the Government to prove knowledge on the part of the alleged possessor, or you must acquit the accused.”

We have heretofore cited cases brought under this same section, the Jones-Miller Act, wherein the Appellate Courts discussed with approval similar admonitions to the jury in connection with the affirmation of convictions of persons who aided or abetted a violation of the section. For the

sake of brevity we again cite at this point only a few cases:

Pon Wong Quong v. United States (C. C. A. 9th),
111 F. (2d) 751;

United States v. Cohen (C. C. A. 2d), 124 F. (2d)
164; 315 U. S. 811 (*Bernstein v. U. S.*).

To the same effect:

Borgia v. United States (C. C. A. 9th) 78 F.
(2d) 550; cert. den., 296 U. S. 615.

In the last-mentioned case the court, on page 555, discusses with approval the application of 18 U. S. C. A., Section 550, and further states:

“It is not necessary that an aider or abettor be present at the actual commission of the offense, or know details thereof.” (Citing cases.)

Additional discussion of a broad-reaching effect of 18 U. S. C. A., Section 550, with reference to “aiders and abettors,” is to be noted in:

United States v. Olweiss (C. C. A. 2d), 138 F.
(2d) 798, at p. 800.

“It was proper to charge them as principals—which they probably were in any event—even though they were only accessories. (§ 550, Title 18, U. S. C. A.): and any evidence admissible against Olweiss was admissible against them, so far as it consisted of conduct in furtherance of the joint venture in which all three were engaged. The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon

the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal.”

H. Defendants’ Proposed Instruction No. 22, Dealing With Accomplices, Was Properly Refused.

On page 45 of Appellants’ Brief they complain that the court should have specifically stated the witness Brander was an accomplice. Appellants contend that the instruction which the court gave might have been misunderstood and, by some strange reasoning, contend that the jury may have misunderstood the court’s instruction to have referred to the testimony of Fred Stein. This argument is hard to follow. Fred Stein elected to avail himself of his constitutional right and did *not* take the stand. In view of this fact, by what stretch of the imagination could the jury have so misunderstood the court’s proper and correct instruction on the subject of accomplices?

The court’s instruction on “accomplice” is in line with that which has been repeatedly approved by the Appellate Courts. It is to be noted from the transcript [R. 380] that the court pointed out, with reference to an accomplice:

“* * * that such testimony is to be weighed and scrutinized with great care, and that, if it is not corroborated by other competent evidence, it should not be relied upon * * *.”

The court, also, as is reflected in [R. 386] the transcript, gave what may be characterized as the usual and proper instruction concerning the credibility of witnesses. We quote:

“You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under (434) which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relations which he bears to the Government or the defendant, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility. If a witness is shown knowingly to have testified falsely on the trial touching any material matter, the jury should distrust his testimony in other particulars, and in that case you are at liberty to reject the whole of the witness’ testimony.”

There is no dispute but what a conviction may be sustained upon the uncorroborated testimony of an accomplice. See the following case involving *narcotics*:

United States v. Mule (C. C. A. 2d), 45 F. (2d) 132.

Convictions have been sustained where based chiefly upon the testimony of accomplices. See the *narcotic* case of:

Hass v. United States (C. C. A. 9th), 31 F. (2d) 13; cert. den., 279 U. S. 865.

With reference to the instruction on accomplices and the law pertaining thereto, we feel the following authorities fully support the contention that the court was right

in refusing the charges proposed and in giving the instruction which it did:

The courts, however, have held that even the failure to give such a precautionary instruction with reference to an accomplice is not reversible error. That a refusal to give such an instruction is generally discretionary, is supported by the following:

Pine v. United States (C. C. A. 5th), 135 F. (2d) 353, at p. 355; cert. den., 320 U. S. 740.

The Supreme Court, in affirming an opinion of this Circuit, has held that while it is better practice to give such an instruction, that the refusal is not error.

See:

Caminetti v. United States, 242 U. S. 470, at p. 495 (aff. *Diggs v. United States*, 220 Fed. 545 (C. C. A. 9th)).

That an instruction somewhat similar to the one given by the trial court is all that is required, see the following:

United States v. Schwartz (C. C. A. 2d), 150 F. (2d) 627;

United States v. Schanerman (C. C. A. 3rd), 150 F. (2d) 941;

United States v. Sorcey (C. C. A. 2d), 151 F. (2d) 899.

Upon the proposition that no special instruction need be given when the matter is covered by the general instructions, see:

Grimes v. United States (C. C. A. 5th), 151 F. (2d) 417;

United States v. Schanerman (*supra*).

V.

Discussion of Evidence Copied in Appellants' Brief,
Pages 47-49.

1. DISCUSSION OF QUOTED EVIDENCE, PAGE 47, TO END
OF PAGE 49 OF APPELLANTS' BRIEF.

This evidence pertained to a matter previously discussed in Appellants' Brief. It pertains to alleged improper questions or claimed misconduct. These questions were of a preliminary nature, and to establish identity. In most instances where objection was made, the court gave proper admonitions to the jury.

In previous pages of this brief, namely, commencing on page 24 under our heading "A. The Prosecutor Did Not Commit Misconduct," is our answer to these contentions.

2. DISCUSSION OF THE EVIDENCE SPECIFICALLY
QUOTED IN APPELLANTS' BRIEF, COMMENCING PAGE
50, TO AND INCLUDING PAGE 69.

This quoted evidence was that of the witness, Mrs. Marguerite Brander. In the main, this testimony deals with prior possession of opium by the appellant Fred Stein, his use of same, and his admissions and statements regarding opium. This all occurred during the three-month period prior to the final separation.

It would unnecessarily lengthen this brief to again discuss this testimony. It is our opinion that we have fully covered these contentions in previous pages of this brief, namely, commencing on page 29, under our heading "B. Evidence Concerning Prior Relationship With Narcotics and Its Use was Pertinent and Properly Admitted."

3. CONTENTIONS RAISED BY THE QUOTATION OF EVIDENCE REFLECTED ON PAGES 70 THROUGH 72 OF APPELLANTS' BRIEF.

This quoted evidence refers to Government's Exhibit No. 4, a small bottle containing a solution of opium, or yen she. This subject matter has been fully covered in this brief, commencing on page 34 thereof, under the subheading "C. There was no Error in the Introduction of Government's Exhibit No. 4, a Small Bottle Containing a Solution of Opium, Yen She."

4. ANSWERING THE EVIDENCE QUOTED ON PAGES 73 AND 74 OF APPELLANTS' OPENING BRIEF.

Appellants complain of the court's ruling permitting an explanation by the witness, Mrs. Brander, to the implication raised by questions and other testimony, that she had made a demand for money and specifically for the sum of \$5,000. This type of testimony was invited. Appellants saw fit, and probably quite properly so, to introduce in evidence a telegram dated May 5, 1945, from witness, Margaret Brander, to Fred Stein [R. 228].

It should be noted that this telegram, by its date, was sent over *four* months prior to the final separation, the final separation taking place September 11, 1945.

The implication sought to be established by this telegram was that Mrs. Brander was either endeavoring to blackmail or was threatening Fred Stein at a previous date, namely May 5, 1945. This was followed by questions implying that she had later asked for \$5,000, which she denied [R. 229]. The witness explained the circumstances of her sending the telegram and what had occurred

after its sending, and the fact that she returned and lived with Fred Stein [R. 261].

These implications opened the avenue for the witness to give a further explanation, which she gave.

The witness, Brander, related that subsequent to the sending of this telegram of May 5, 1945, she returned and again lived with Fred Stein, and after that date Fred Stein had entrusted with her a sum of money, namely, approximately \$30,000. This money she returned to Fred Stein [R. 364-365]. It is thus apparent that if Mrs. Brander had been making a demand of \$5,000, or any such sum, from Fred Stein, that the sting of this insinuation is removed by her later possession of \$30,000 of Fred Stein's money which she readily returned to him. Attempt was made to impeach Mrs. Brander, she had a right to explain and give the complete picture. This evidence was invited by the implications cast toward witness Brander.

5. ANSWERING THE EVIDENCE QUOTED ON PAGES 75
THROUGH 79, OF APPELLANTS' OPENING BRIEF.

This quoted evidence again deals with the subject-matter of alleged improper questions and contended misconduct upon the part of the prosecutor. It should be noted that no complaint has been made that the prosecutor indulged in improper arguments to the jury.

We have heretofore answered these contentions pertaining to misconduct; however, we call attention to certain other matters that are noted in such quoted evidence.

The Narcotic Agent Davis testified that he had been a Narcotic Agent for nine years, having worked in the Southern California area and close to the Border; that he

knew the price being paid for a can of opium in the opium traffic as of the month of September, 1945; thus, his qualifications were abundantly established.

This Narcotic Agent was then permitted to testify that the value of a can of opium at that date would be between \$250 and \$300. Complaint is made because of these questions and answers.

The court permitted this evidence because of the defense of entrapment. This evidence was also pertinent upon the question of motive. It is submitted that a person would be far more apt to be interested in securing possession of these eight cans of opium, which had such a value, than they would had their value been but slight. It is admitted that value is not a necessary prerequisite, but on the element of motive and intent it was pertinent and proper evidence.

The Narcotic Agent related his qualifications and also that he was familiar with expressions used by people who are trafficking in opium, after which he was permitted to relate names or terms that were generally applied by people who traffic in opium, to smoking opium. He gave in answer such terms as "stuff," "junk," and "hop." R. 352-355.]

It should first be recalled that the witness, Mrs. Brander, testified that Fred Stein had referred to smoking opium as "stuff," or "junk" [R. 142, 155-156], and had also referred to it as "dope" [R. 132]. It is therefore difficult to see where any complaint can be made for

a qualified Narcotic Agent to testify, as an expert, to the names generally applied to smoking opium by those who traffic in it. It would not be expected that such persons would refer to it as smoking opium. Should the jury be kept entirely in the dark?

That such was proper, see the following:

Officers and habitual users of opium have been permitted to express an opinion that a substance found was, in fact, opium.

Ching v. United States (C. C. A. 9th), 264 Fed. 639; cert. den. 254 U. S. 630;

Pennacchio v. United States (C. C. A. 2d), 263 Fed. 66; cert .den. 253 U. S. 497.

Police officers have been permitted to testify as to the meaning of letters and figures on horse-racing scratch sheets.

People v. Newman, 24 A. C. 162, 148 P. (2d) 4.

The *Newman* case pertained to racing forms or scratch sheets bearing symbols which otherwise would be unknown to the jury, but the meaning of which was known to the police officers. The court held that it was proper that such officers, as experts, explain the meaning of such symbols.

This is similar to the instant case where the Narcotic Agent also testifies as an expert in assisting the court and jury.

In the *Ching* case, *supra*, a federal officer was permitted to express an opinion that the opium found in the defendant's room, in the form of a "card of opium," was in the form it was customarily in, when sold for smoking. In the *Ching* case the officer was also permitted to state that the usual price charged for such a card was \$2. Thus *value* was considered to not be prejudicial in the *Ching* narcotic case of this Circuit (p. 642 of *Ching* Opinion).

This testimony, with respect to both the value and slang names applied to the opium, all comes under the subject-matter of a person who testifies as an expert who has had a *special knowledge* as to the subject-matter.

It is again illustrated in a marihuana case. See:

Banks v. United States (C. C. A. 9th), 147 F. (2d) 628.

In a *narcotic* case, cited below, the court approved the admission of evidence showing defendant's large bank account, on a charge of unlawfully selling and receiving morphine, to rebut a person's testimony that she was but a housewife, receiving allowances, or was engaged in some other business. The court pointed out that such evidence " * * * had some probative force as tending to show that she was engaged in the illicit traffic in narcotic drugs in which it is common knowledge that the profits are large * * *."

To this effect:

Silverman v. United States (C. C. A. 1st), 59 F. (2d) 636; cert. den. 287 U. S. 640.

Conclusion.

It is respectfully submitted that there was substantial evidence indicating the guilt of the appellants. There was sufficient, in fact considerable, evidence pointing to the guilty knowledge upon the part of both appellants, of the possession of the smoking opium charged in the indictment.

The instructions, when viewed in their entirety, were fair, proper, and in accordance with the law.

In view of the presence of substantial evidence establishing the guilt of the appellants, it is submitted that no errors prejudicial to the appellants were committed in the District Court.

The presumption contained in Section 174 of Title 21, U. S. C., is constitutional.

The issue of entrapment was submitted to the jury upon ample and correct instructions.

In view of the foregoing, it is respectfully submitted that the verdict and judgment as to both of the appellants should be affirmed.

Respectfully submitted,

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN and BERNARD STEIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

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No. 11268.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED STEIN and BERNARD STEIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

*To the Honorable Justices of the Circuit Court of Appeals
for the Ninth Circuit:*

In the course of the oral argument, the question was asked whether counsel for Bernard Stein joined with Fred Stein in the objection to the yen shee.

On page 370 of the transcript of record, the following proceedings took place:

“Mr. Lavine: May it please the court, at this time we move to strike from the evidence the testimony which was offered yesterday regarding the yen shee, or particularly the exhibit, which I think was Government’s Exhibit 4, regarding the yen shee, as incompetent, irrelevant and immaterial under this indictment, as to any matters alleged in the indictment. And we move to strike it from the evidence.

The Court: The motion is denied and an exception noted.”

* * * * *

“Mr. Lavine: I move, again, your Honor, on all of the grounds heretofore mentioned, first of all, for a directed verdict on the grounds of the insufficiency of the evidence; second, I move for a directed verdict on the grounds that the defendant Fred Stein was entrapped; and, third, I move for a directed verdict on the ground that as to some of the evidence in this case, relating particularly to Government’s Exhibit 4, I believe, the yen shee, the house was illegally searched and it was illegally seized.

* * * * *

The Court: The motion is denied and an exception noted.

Mr. MacDonald: May it please the court, on behalf of the defendants John Fisher and Bernard Stein, and each of them, *I join in the same motions that were made by Mr. Lavine in reference to the defendant Fred Stein; * * **”

It must be clearly borne in mind that the evidence regarding the yen shee first developed in the trial of the case, that the indictment did not charge anything about this yen shee, and the first knowledge of the facts about it came from the testimony at the time it was introduced. (See *McNabb v. U. S.*, 318 U. S. 322.) As a matter of fact, the prosecutor himself had not introduced it at first, and he later called back Marguerite Brander, with the consent of the Court, to ask further questions about it. [R. 193]. Upon its first introduction there was an objection to its introduction on the ground that it violated the defendant’s rights under the Fourth and Fifth Amendments to the Constitution of the United States and that the officers had at the time neither any search warrant or any process [R. 194].

The going into the house by the former sweetheart of Stein, who broke in with two bricks, and thereafter, on the day subsequent to the date of the finding of the cans of smoking opium in their house, with them and making a further search and seizure, was not lawful. Her nominal ownership of the premises as a joint tenant did not give the officers the consent of the defendant to search and seize the evidence.

Amos v. U. S., 255 U. S. 313;

Johnson v. U. S. (decided Feb. 2, 1948), 16 L. W. 4133;

The mere fact that the deed to the property was placed in joint tenancy did not place the property in the ownership of Marguerite Brander. All of the money for its purchase was put up by the defendant Fred Stein. She was no more under the facts of this case than a trustee of his interest, with a possible right of survivorship in the event of his death. She was no more entitled to the property than other persons who receive property in their name, but are holding it for the benefit and trust of another. At no time did Marguerite Brander claim any right or title to the property itself, or right to possession or to remain there. She was not and could not be the lawful wife of the defendant, nor could she claim any rights thereunder if she had married the defendant. Many a person puts property in the name of another, but holds it for his benefit during the nominal title thus held. Marguerite Brander had no actual rights in the property and could not give consent to the officers to enter the

premises for the purpose of searching for and seizing evidence.

Amos v. U. S., 255 U. S. 313;

Johnson v. U. S., 16 L. W. 4133.

If a lawful wife cannot do so, certainly a woman in the position of Marguerite Brander could not do so. A joint tenancy, as a matter of law, even if its fullest effect were to be granted, would only give Marguerite Brander a separate and equal share in the property and such separate and equal share is divisible.

During the course of the oral argument there was also a question raised about whether the arrest itself was lawful, it being implicit in the argument that if the arrest was unlawful, any seizure that followed was necessarily unlawful.

Johnson v. U. S. (decided Feb. 2, 1948), 16 L. W. 4133.

Counsel for the Government stated that nothing had been brought up during the trial on this subject. On page 92 of the record the following occurs:

“Q. By Mr. Neukom: Did you get up close to the house? A. Yes. To get through the doorway from the side into the garage necessitates you getting fairly close to the house. That drawing is not very good. It isn't in scale at all and that door is really closer to the house than would be indicated there, but that is as close as I did come to the house.

Q. Mr. Davis, in your experience as a narcotic officer have you ever had occasion to be near premises or rooms where opium has previously been smoked or cooked and detect or observe the odor of a place where opium has been so used? A. Yes, sir, I have.

Q. At the time in question on this evening did you observe any peculiar odor or any odors which in your opinion were those from a previous use of opium on the premises?

Mr. Lavine: Just a minute. I object to that as incompetent, irrelevant and immaterial and not proper redirect examination.

Mr. Neukom: There has been an effort made, your Honor, to point out this man had no probable cause for the arrest.

The Court: Let us not argue the question now. I can see the point. The objection is overruled.

Mr. Lavine: Exception.

The Court: Exception noted.

The Witness: I did not smell any smoking opium up there that night." [R. 92-93.]

It is apparent from the foregoing that counsel was well aware from the questions asked by counsel that "there has been an effort made to point out this man had no probable cause for the arrest," (referring to George R. Davis, a Government agent) and that Government counsel himself was so aware in the beginning of the case no effort was made to rebut or meet this testimony.

The procedure was challenged by motion in arrest of judgment, based upon objections that the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States had been violated. While the motion was not specifically predicated on the unlawfulness of the arrest itself, the introduction of the evidence in the case could only be lawful if it was seized pursuant to a lawful arrest. Here there was not a lawful arrest. What the officers found later on could not be justified under the unlawfulness of the arrest itself and, therefore, both the search and seizure were unlawful.

At page 193 the following occurred:

“MRS. MARGUERITE BRANDER,

a witness for the plaintiff, resumed the stand and testified further as follows:

Mr. Neukom: With the permission of the court and the consent of counsel, you will recall that there was quite a group of papers and packages up on the stand when I concluded the examination of the witness, and I neglected to make inquiry of this witness as to a little bottle, Government's Exhibit for identification No. 4. I would like permission of the court, believing it will save time, if I can ask a few questions about that and the cross-examination can continue.

The Court: Permission granted.

Direct Examination.

Q. By Mr. Neukom: I show you a little bottle, Government's Exhibit No. 4 for identification, and ask you if you have ever seen that before? A. Yes, sir.

Q. Will you look at it? At the time that you saw it did it contain approximately that much liquid? A. Yes, sir.

Q. And when did you first see this bottle containing the liquid? A. That was found in my cabinet where I keep my spices and flavorings.

Mr. Lavine: I move that the answer be stricken as a conclusion of the witness.

The Court: I didn't understand the answer.

(Answer read by reporter.)

Mr. Neukom: May I lay further foundation?

The Court: Did you find it? A. Yes, sir; I found it with two federal agents that were with me.

Q. By Mr. Neukom: When was that? A. That was the day after—that was the 15th.

Q. Of September, 1945? A. Yes, sir.

Q. Just tell us briefly what cabinet and where it was in the house.

Mr. Lavine: Just a minute, your Honor. We object to this as incompetent, irrelevant and immaterial. This is the first time this evidence has developed and we would like to make some inquiry on voir dire as to whether these federal agents had any search warrant at the time or any process.

The Court: Both of them had the same right of possession, isn't that true?

Mr. Lavine: Yes, both had the same right of possession, but as far as charging it to any other person than this person—I understood her testimony yesterday to be that she had left the place and that she broke in with a brick, threw a brick through a window and now we have Federal officers entering.

The Court: Objection is overruled.

Mr. Lavine: Exception.

The Court: Exception noted.

Mr. Lavine: So the record is clear, we object to this evidence on the ground it is violative of the Fourth and Fifth Amendments to the Constitution of the United States and on the further ground it was an illegal search and seizure with no process shown for the entry and search of this house.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Court: Exception noted.

Mr. Neukom: May the record further show that there has been no motion made to suppress.

Mr. Lavine: May the record further show—

The Court: Just a moment, gentlemen, let us get on with the evidence. I do not want to hear too much

conversation from attorneys the same as you gentlemen do not want to hear too much from the court. After all, what the court says and what counsel say is not evidence in this case and the jury should not consider it.

Mr. Lavine: I appreciate that, your Honor.

The Court: And it is not an opportunity for arguing the case. Both of you will have plenty of opportunity to argue the case when the evidence is all in.

Mr. Lavine: He has made a legal objection and I want the record to show this is the first time this evidence has been unfolded and the first time the defendants have had any knowledge of it.

Q. By Mrs. Neukom: Mrs. Brander, did you take the Federal officer into the home with you? A. Yes, sir.

Q. And in doing so did you search about the kitchen and other places in the premises? A. Yes, sir.

Q. And in doing so where did you find this bottle? A. In the spices and flavoring cabinet just over the stove.

Q. And you turned it over to the Federal officers? A. Yes, sir.

Mr. Neukom: No further questions. I would like to offer the bottle in evidence.

Mr. Lavine: To which we object on the ground that it is incompetent, irrelevant and immaterial and in violation of the defendants' rights under the Fourth and Fifth Amendments of the Constitution.

The Court: Objection overruled and exception noted, and it is admitted in evidence.

(The bottle referred to, heretofore marked as Government's Exhibit No. 4, was received in evidence.)"
[R. 193-196.]

The distinguishing incident of a joint tenancy is a right of survivorship.

DeWitt v. San Francisco, 2 Cal. 289;

Greer v. Blancher, 40 Cal. 194;

Estate of Harris, 169 Cal. 725;

Hurlbert v. Title Ins. & Trust, 181 Cal. 692;

Green v. Skinner, 185 Cal. 435;

Hannon v. So. Pacific Ry., 12 Cal. App. 350.

Upon the death of a joint tenant who has paid for the property with his own money, the United States, for tax purposes, assesses the entire property as though belonging to him.

See:

California State Bar Journal, November-December, 1947, Vol. 22, "Joint Tenancy and the Estate Tax", p. 492.

It would seem only fair to argue that the right of a mistress—with several names and still married to someone else—who occupied a house [R. 219] and who had no interest in the property other than "it was put in her name" [R. 224-225], merely created a nominal title.

There is no evidence of any delivery of any deed to her, or of any intention on her part to receive the property as a joint-owner. To hold that after she left Stein, "she thereafter would have the power and authority to permit officers to enter and search the premises," is contrary to the decisions and purposes of the Fourth and Fifth Amendments to the Constitution of the United States.

Joint-tenants, in fact, may contract with each other concerning the use of such property—such as the exclusive use of the property by one of them, or the exclusive possession by one of them. (*Spahn v. Spahn*, 70 Cal. App. (2d) 791, 801.) Therefore, where the title is only nominal and the mistress vacates the same, certainly it would be wrong to hold that she has any rights to bring about a search *and seizure* by officers through her consent, since the joint-tenancy ownership is separate ownership and one joint-tenant may dispose of his interest in real property without the consent of the other.

Wilke v. Vencill (1947), 30 A. C. 99, 180 P. (2d) 351.

See also:

Edmonds v. Commissioner of Internal Revenue, 90 F. (2d) 14 (9th Ct.).

There is no intention of the parties in this case to make a gift of the property to Marguerite Brander, with whom Stein merely sought a place to live with her (according to Marguerite Brander's own testimony) and because none could be found, he bought a place with his own money [R. 224-225]. There is nothing to show that she received title to the property, or that she intended to hold title to it.

The Fourth Amendment to the Constitution forbids "search and seizure without a warrant or process", and Marguerite Brander had no more right to take these officers into the house by throwing two bricks through the

window, and gaining entry thereto, and admitting them, than did the officers, and thereafter to make a *seizure*.

She might have had authority to permit them to search for her property but not for his and in no event to seize his property.

Amos v. U. S., 255 U. S. 313;

Anne Johnson v. U. S., 16 L. W. 4133.

“Belief, however well founded, that an article sought is in a dwelling house furnishes no justification for a search of that place without a warrant, and such searches are held unlawful notwithstanding facts unquestionably showing probable cause. (*Ag-nello v. United States*, 269 U. S. 20, 33.)”

To permit searches as were conducted by the officers in this case is to transfer the Fourth Amendment to a nullity and leave the defendant's 'home secure only in the discretion of police officers . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government Agent.”

In *United States v. Di Re*, 16 L. W. 4071, 92 L. Ed. 218, the Supreme Court said: “The Government says it would not contend that armed with a search warrant for a resident only, it could not search all persons found in it.” The same reasoning would apply—only stronger—to the

contention that without a search warrant, the Government could now search a residence and seize articles therein, which were not the property of, and not contended to belong to, the person bringing them into the residence, to-wit, Marguerite Brander.

The things forbidden by the Fourth and Fifth Amendments are two: First, unlawful *search*, and, second, unlawful seizure.

Boyd v. United States, 116 U. S. 616, and
Takahashi v. U. S., 143 F. (2d) 118.

Even if he might say that the search was permitted by Marguerite Brander, the seizure thereof, without a warrant or other process, was in violation of the Fourth and Fifth Amendments to the Constitution of the United States:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches *and seizures*, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*” (4th Amendment, Italics are ours.)

In other words, there was no particular description, and no authority, for the seizure of the yen shee. Nor, for the seizure of the other packages from the premises, without a warrant.

The Unlawfulness of the Arrest.

The court also discussed the question of the lawfulness of the original arrest. While counsel for the Government was well aware, as we have heretofore pointed out, that the lawfulness of the arrest was being questioned and challenged and so commented during the trial, he questioned our right to raise it in the Appellate Court. However, in *United States v. Di Re*, 92 L. Ed. 218, 223, the validity of the arrest was raised upon appeal and there considered. The court considered the arrest and its validity in connection with the unlawfulness of the search and seizure.

The Supreme Court of the United States considers the question of the lawfulness of the arrest in *U. S. v. Di Re*, *supra*, and the manner of arrest of the defendant Bernard Stein was clearly in violation of his constitutional rights.

As to the questions asked by Judge Bone, with reference to the odors of smoking opium, the Supreme Court held in *Anne Johnson v. United States*, 16 L. W. 4133, that "*odors are sufficient to constitute probable ground for a search.*" But, what the Supreme Court further hold is: "That odors alone do not authorize a search *without the warrant*," and that odors might be very persuasive on the basis to secure a search warrant. But, what the Court further holds is: "That a search without a warrant becomes unlawful when a warrant is obtainable." Hence this case is decisive that the only rights these officers had was to get a warrant.

In the present case, the undisputed evidence is that the Federal Officers were contacted at 5:59 p. m. on the night of September 14, 1945. The evidence further is that Marguerite Brander told the officers what she had found and wrapped up in three packages. There was no odor

to the packages and they were then wrapped up in wrapping paper, and later re-wrapped for the purposes of sending the packages to the court.

It was impossible to tell the contents of these packages without some examination; but such examination was possible and there was plenty of time to obtain a search warrant. The laziness of the officers in not getting the search warrant is no excuse for making the arrest and search permissible without a warrant. No probable cause existed from the mere statement of Marguerite Brander, who did not claim to be a user of the substance, and even if it did, it was something to be determined by a *judicial officer*, not the officers. (*Anne Johnson v. United States*, 16 L. W. 4133, decided February 2, 1948.)

As to the sufficiency of the evidence regarding Fred Stein, no one in this case testified that they ever saw Fred Stein with these cans or that he ever knew the contents of the cans. Marguerite Brander did not say that she discussed these particular cans with him, nor did she identify these cans as ever having been in his possession. The mere presence of the narcotics on the premises would not make them *his* any more than it would *hers*, and since it was never seen anywhere other than in the open garage—there is no proof sufficient to show that Fred Stein had these cans, or had had these cans at any time.

As to Bernard Stein, the evidence likewise is entirely insufficient, since the knowledge of the contents of the cans was not even actually known to the officers on that night. They arrested him merely on the word of Marguerite Brander.

As to the Entrapment.

The evidence is, unmistakably, that up to the time that Marguerite Brander phoned Bernard Stein in the presence and hearing of Federal Officer Koehn, he had no possession of any narcotics and no intention of possession of the same.

The solicitation, inducement, and persuasion to come to the house at 3930 Dixie Canyon Avenue, came from Marguerite Brander, in cooperation with Federal Agent Koehn. It was she who telephoned to Bernard Stein, while Officer Koehn was listening. She had been living with an elderly, former federal officer named Mr. Keys [R. 197] and Mr. Keys had talked to Federal officers about Fred Stein prior to this night [R. 201]. It was Mr. Keys who gave Marguerite Brander the name of Mr. Koehn and she telephoned him and he came over and saw her at 7:00 o'clock that night [R. 202].

She thereafter called Johnny Fisher on the telephone, Mr. Koehn being present. He heard the conversation. She let him listen in on the conversation and she called in Mr. Koehn's presence and asked them to come over to the house [R. 205].

Furthermore the lure was conducted through the means of a telephone. The conversations were conducted by phone and the inducement was conducted by telephone by Miss Brander in cooperation with the Federal Officers. This certainly violated the Federal Communications Act, Title 47, Section 605, as follows:

“ . . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport effect, or meaning of such intercepted com-

munication to any person; and *no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit of another not entitled thereto*; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; . . .” (Emphasis added.)

Certainly the use of the telephonic instrument in the way testified to in the testimony of Miss Brander, herself, the Government’s own witness, shows that it was all conducted for the benefit of the Government’s agent seeking entrapment.

This violates both the Fourth Amendment to the Constitution and the statutory provision relating to Title 47, Section 605. See the following cases: *Nardone v. U. S.*, 302 U. S. 379 and 308 U. S. 338.

See, also, *Olmstead v. United States*, 277 U. S. 438, wherein Mr. Justice Brandeis, in a dissenting opinion, involving wire tapping before the Federal Communications Act of 1934 was passed, said:

“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest danger to liberty lurk in

insidious encroachment by men of zeal, well-meaning, but without understanding.

“Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. Pierce’s Code, 1921, sec. 8976(18). To prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin v. Brundage*, 276 U. S. 36, *ante*, 457, 48 Sup. Ct. Rep. 267 . . .

“Will this court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. . . .”

The Question of Entrapment Should Have Been Left to the Jury Under Proper Instructions.

Mrs. Brander gave several versions of what she did and when she did it concerning the cans of “stuff.” When being cross-examined by Mr. McDonald, she said that on the day of her quarrel with appellant on which he left, she broke into the house by breaking a window with a brick.

She said, “after I got the rest of my belongings and little knick-knacks and things, I went back to 1629½ Pacific Avenue, the residence of Mr. Keys.” [R. 189.]

Mrs. Brander testified that on the 14th of September, 1945,

“I asked Mr. Keyes what the man’s name was that was out at the house to see him in regards to my going out with Fred Stein and he told me it was Mr. Koehn or Coen, he believed. He did not re-

member just how he pronounced his name but he knew how he spelled it. So we went to the directory and he found the name. He says, 'This is it,' so I was in need to call someone and wanted to get in touch with the authorities and I called Mr. Koehn, since he had already been out to the house and seemed to know something about the case.

I called him at his home. It was at night.

I asked him to come over, that I wanted to talk to him.

Yes, he eventually arrived there and it was after 7:00 o'clock. I know that.

After that time I called Johnnie Fisher on the telephone.

I don't remember whether the call was before or after that I had gone over this entire matter with Mr. Koehn. [Tr. 201-202.]

I told Mr. Koehn in that conversation that I had taken these cans of opium that I had found and planted them around back of the house. I told him I knew where it was; yes, sir."

Certainly it would hardly be reasonable not to infer that Mrs. Brander, who had in mind calling a narcotic officer that first night after Stein and she quarreled, and did so, would have proceeded to make her own plan as to how to proceed without discussing that most important detail with said officer.

Mrs. Brander admitted to the court that she knew that the officers would arrest the defendants as soon as they took possession of the packages. She undoubtedly knew, even when she called Koehn on the night of the quarrel, such an arrest would be made when, and if, the necessary evidence was secured. She knew at that time that she

did not then have the necessary evidence, aside from her own word.

Hence, from the fact that she called Koehn and conversed with him, and knew that without them she could not accomplish her purpose, it may be inferred that it was her purpose to have the officers tell her how to proceed, and what followed indicates that they did so, for the scheme of detection was carried out in a clever and professional plan.

Under cross-examination by Mr. Lavine, in one of her many speeches to the jury, Mrs. Brender first denied that in going to the police she expected to get cash out of Stein, and then continued as follows:

“I know the people I was dealing with better than that. Even if I had aimed or tried I knew just where I stood. I was going to turn it over to the Federal agents. I did not think it should go through any other hands. I don’t know. I have always tried to do things just right and the Federal agents were the one I thought it should be turned over to and I was holding it.” [R. Tr. 248.]

The conversation with the police, to which Mrs. Brander referred, she said occurred on the 12th or 13th of September. [R. Tr. 244, 245.]

Hence, according to her own volunteered testimony, she knew “just where she stood” with the Federal agents well before the trap was sprung, and since she had always tried to do things just right with them, she must have had experience in cooperating with them before and must have known that they would formulate the plan and procedure of securing evidence.

Mr. Keys, the mutual friend of Koehn and Mrs. Brander, was a party to the consummation of the plan. He

supplied Mrs. Brander transportation and supplied the flashlight for Koehn to inspect the packages of stuff which Mrs. Brander had secreted. This was on the 14th and before Fisher and Stein arrived [R. Tr. 248, 249].

Obviously, Koehn's only purpose in inspecting was to check Mrs. Brander's word. Mr. Keys' telephone was used by Mrs. Brander in calling Koehn and making other calls concerning the plot to entrap the defendants.

The direct examination of agent Koehn begins with September 14th, 1945, and adds little information concerning the parts which the Government agents and Mrs. Brander and Keys played and the relation of these persons to each other.

However, he admitted talking with Mrs. Brander at Keys' home and then listening to her telephone conversation with Fisher [R. Tr. 268]. After that he called Keys and asked him to meet Koehn at a certain point as soon as possible and then proceeded to that place with Koehn's wife and Mrs. Brander [R. Tr. 269].

On cross-examination, Koehn swore that he had never seen Mrs. Brander until September 14, 1945.

He said that when he arrived at home on that day his wife said "Uncle Jim" called; this was Mr. Keys, and he had made 100 calls to the houses in the last two years [R. Tr. 280].

Koehn denied that Mrs. Brander ever called Bernard Stein in his presence, but admitted that he had made notes of conversations of Mrs. Brander to which he listened in. She called Fisher in his presence, at about 7:30 and 8:00 o'clock [R. Tr. 281].

The entire picture presented by the testimony of Mrs. Brander and Koehn shows that Mrs. Brander, in a spirit of anger, tried to have Bernard Stein arrested on several charges among which some offense pertaining to narcotics; that through Keys, an old law enforcement officer, and close friend of Koehn, she contacted Koehn as early as the 11th of September and they had a conversation at Keys' home that day. The evidence warrants the inference that the plan and procedure which was followed through Mrs. Brander to entrap the defendants was Koehn's or was arranged by him together with Mrs. Brander, and that Keys took part, at least as a consenting participant.

Mrs. Brander's part was to secret cans of opium on the premises formerly occupied by her and Stein; to decoy Stein and Fisher to the place and make certain that they each took possession of some part of the opium, whereupon Koehn and his partner, Davis, were to arrest the defendants.

This conspiracy was carried out, although, as to Stein, it almost failed, because he at first refused to take possession of the package of cans which Fisher had not taken; however, Mrs. Brander taunted him into picking up the package, and he was then arrested.

Upon these facts appellant contends that an unlawful entrapment was perpetrated.

The testimony of Mrs. Brander about her conversation with Stein, in which she claimed that he had refused to return her clothes unless she gave him his "stuff," does not conclude the question.

The jury were not required to believe what she said and the evidence presented by the defense through the testimony of the defendants Fisher and Bernard Stein, if

believed by the jury, refutes Mrs. Brander's above mentioned claims.

According to their testimony, they did not know what was in the packages and were ensnared into picking each one up on Mrs. Brander's representation to them that it was an article of hers which she was taking from the premises. At her request they carried flower pots and other things besides the packages to the automobiles of Mr. Keys and "Mr. and Mrs. Patterson," as Koehn and his wife were called by Mrs. Brander when introducing them to the men.

In considering the law as applied to the facts herein, as shown by the testimony which has been reviewed, it is important to first note that this is not like one of the common cases of a dope peddler or druggist who habitually sells opium to anyone not suspected of being a federal narcotic agent.

If it originated in the mind of the law enforcement officers or their agents or of confederates whose inducements to the defendant were ratified or approved by such officers the defendants are not guilty, because citizens shall not be prevailed upon to commit a crime in order that the Government may punish them therefor.

Among the narcotic cases, it seldom occurs that a case of this type is presented, in which persons not employed by federal officers, but co-operating with them, have induced the crime. However, *Butts v. United States*, 273 Fed. 35, is one specimen of the class.

The opinion relates that one Rudolph, who had never obtained morphine from Butts while under arrest on a narcotic charge was told by Lake, a narcotic inspector for the Internal Revenue Service that if he, Rudolph, would help catch some law violators he would be let go.

Rudolph agreed and asked Butts for an ounce of morphine. Butts at first refused; Rudolph later made calls to Butts on the telephone importuning the latter to get him some morphine and finally Butts complied; Lake testified that he was present with Rudolph when the calls were made and furnished the \$190 for the morphine.

The court declared that the evidence conclusively showed:

“That the conception of and the intention to do the acts which the defendant did in this matter did not originate in his mind or with him, but were the products of the fertile brains of the officers of the government, which they instilled into the mind of the defendant, and by deceitful representations and importunities lured him to put into effect.”

The court states the following doctrine:

“The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it. It was fatal error to refuse to instruct the jury as requested, and it is unnecessary to discuss the other alleged errors at the trial, because, if they existed, they will probably not be committed again.”

Peterson v. United States, 255 Fed. 433, is similar to the instant case in that if the defendant's testimony were believed she was entrapped by soldiers in uniform who were sent out as investigators. However, she did not deny that she sold them liquor, and they testified that she had done so, but according to the defendant's testimony the men persisted in their importunities, assured her they were not cops and that she need not be afraid and worked upon her sympathies until she finally sold the beer.

The opinion concludes:

"It is obvious that the case did not present any question of law for the jury to determine, and only one controverted question of fact—that is to say, whether or not the defendant was instigated by the officers to sell the beer.

It results that the judgment must be and is reversed, and the case remanded for a new trial."

As to other points they are covered in the opening brief and not answered.

For which reasons we pray for reversal of the judgments.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE HENRY CLEVELAND,	}	No. 11276
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		
ALEX L. PENOR,	}	No. 11274
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		
WILLIS BERYL SMITH,	}	No. 11275
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

COMBINED APPELLANTS' BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon.

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FILED
AUG - 1947
PAUL P. O'BRIEN,
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In the United States
Circuit Court of Appeals
For the Ninth Circuit

GEORGE HENRY CLEVELAND,	<i>Appellant,</i>	}	No. 11276
vs.			
UNITED STATES OF AMERICA,	<i>Appellee.</i>	}	

ALEX L. PENOR,	<i>Appellant,</i>	}	No. 11274
vs.			
UNITED STATES OF AMERICA,	<i>Appellee.</i>	}	

WILLIS BERYL SMITH,	<i>Appellant,</i>	}	No. 11275
vs.			
UNITED STATES OF AMERICA,	<i>Appellee.</i>	}	

COMBINED APPELLANTS' BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon.

JURISDICTION

This Court has jurisdiction of these appeals pursuant to Title 28, Section 723(A), U. S. Code and the rules of the Supreme Court promulgated May 7, 1934.

STATEMENT OF CASES

Generally

These are criminal actions instituted in the United States District Court for the District of Oregon, by the return of indictments charging defendants with violation of the Selective Service and Training Act of 1940 as amended, and the regulations there under.

The defendants are all members of the sect known as Jehovah's Witnesses. In order that the Court may understand some of the beliefs and history of Jehovah's Witnesses, the following excerpts are taken from an article on page 77, of the Reader's Digest for January, 1947:

"The Jehovah's Witnesses' record of persecution for religious beliefs was unequaled during the war. Because they refused to perform any of the normal duties of citizenship, such as voting and jury duty, or to salute the flag, they were accused of being pro-Axis in the Allied countries, and pro-Ally in the Axis countries. In Germany they were among the first to be thrown into Hitler's concentration camps. In Canada the organization was outlawed completely. In England some of its leaders were thrown into jail.

"In the United States, shamefully enough, it was no better. Hundreds of Witnesses attempting to preach their Gospel were dosed liberally with castor oil, Mussolini-fashion, beaten, shot, tarred and feathered. Their literature and meeting places were burned; their children expelled from public schools. Approximately 4000 of

them were sent to prison for claiming that they were ministers of the Gospel and not subject to selective service.

“Instead of being wiped out, the Witnesses thrived on this persecution. The 1940 American membership was estimated at 44,000 and the world membership at well under a million. Today the figures are something like 500,000 in the United States and nearly three million all over the world.

“The name of the society comes from the 43rd Chapter of Isaiah which says, ‘Ye are my witnesses, saith Jehovah, and my servant whom I have chosen.’ Their doctrines are simple, being basically a down-to-earth fundamentalism that follows only what is written in the Bible. For this reason they are against all organized religion, since they can find no justification for a church or a hierarchy of any kind in the Bible.

“The Witnesses prophesy that on some day before 1984 Gabriel’s trumpet will blow and Christ’s voice will announce that the end is at hand. God’s hosts will descend from the heavens to fight the Battle of Armageddon and the ‘Great Theocracy’ will be established on earth. The only human beings left will be Jehovah’s Witnesses. They believe, therefore, that their mission is to bring as many as possible into the fold, and they devote endless hours every week, following Christ’s method of personal invitation. They do it by ringing doorbells, playing their religious phonograph records, and handing out tracts both to householders and on street corners. . . .

“Jehovah’s Witnesses have no churches. Their local

societies are called 'company organizations' and their meeting places, whether an elaborate ex-hospital as in Little Rock, Ark., or a grass hut in the Mysore jungle, are called 'kingdom halls.' On Sunday nights they gather to discuss a Bible lesson, handed down to them by the Brooklyn headquarters. In the daytime the 'publishers,' as they are called, go from house to house 'witnessing' or 'exchanging for a contribution' the pamphlets and books which they have bought from the society. The ideal work week for 'publishers' according to the society is 'five days devoted to God, and one day to secular work.' . . .

"After Rutherford's death in 1942 Nathan Homer Knorr was elected to fill his place. But the Great Personality is a fairly recent convert, Hayden C. Covington, formerly a lawyer in San Antonio and now the society's legal counsel.

"Covington—drawling, handsome, wisecracking—has been described as one of the country's most resourceful attorneys. From 1941 to 1946 he personally handled 4200 Jehovah's Witness cases in the state and federal courts, 35 of them before the U. S. Supreme Court itself. Covington argues all the Supreme Court cases personally and has won notable victories.

"In 1942, for instance, three West Virginians were threatened with prosecution if they did not force their children to salute the flag in school. The Supreme Court upheld Covington, and it is now illegal for any school board to force children to do anything against their religious principles. Another Supreme Court decision,

fought through Covington, established the ruling that distributing tracts is as much a part of the freedom of religion as going to church.

“These momentous decisions probably will be remembered long after Jehovah’s Witnesses become extinct. As Roger Baldwin, head of the American Civil Liberties Union, put it, ‘by contesting in the courts every restriction of them, these Jehovah’s Witnesses have won for you and me a degree of freedom we’ve never had before. In serving what they conceive to be the cause of God, they have served the cause of their fellow men.’ ”

Specifically

A. United States vs. George Henry Cleveland. The defendant was indicted on October 17, 1945, charged with deserting Civilian Public Service Camp number 128, LaPine, Oregon, on June 24, 1945. He admitted leaving the camp, but contended at the trial that he was exempt from training and service under the Selective Service and Training Act for the reason that he was a minister of religion, and as such entitled to the classification of 4D, which was denied him by his local board. At the trial, the Court permitted evidence as to defendants claim for exemption to go into evidence, but in the instructions, withdrew the consideration of defendants’ classification from the jury. (Tr. p. 24).

B. United States vs. Alex Penor. The defendant was indicted on June 14, 1945, charged with deserting from Civilian Public Service Camp number 128, LaPine, Ore-

gon, on June 11, 1945. The defendant contended at the trial that he was a minister of religion and as such exempt from training and service under the Selective Service and Training Act of 1940, but the Court, over the objections of the defendant, withdrew the considerations of defendants' classifications from the jury. (Tr. p. 45, 46). The jury thereupon brought in a verdict of guilty, and defendant subsequently appealed.

C. *United States vs. Willis Beryl Smith*. This defendant was indicted on October 17, 1945, charged with failing to report for induction. He admitted his failure to report for induction at the trial and contended that he was exempt from training and service under the Act, by reason of being a minister of religion and entitled to the classification of 4D. He also contended that he was deprived of his right of appeal by the local draft board in that the local draft board reclassified defendant from 4F to 1A against his will and after he had filed notice of appeal which they disregarded, and wrongfully denied. The Court withdrew from the consideration of the jury the question of defendants classification and also withdrew from the jury the consideration of the fact that defendant had been deprived of his right of appeal by the local board.

QUESTIONS INVOLVED

I.

Have the defendants, after having reported to Civilian Public Service Camps, or after having been ordered to report for induction, as ordered by their local draft

boards, exhausted all administrative remedies so as to qualify them to urge in defense to an indictment charging desertion from a Civilian Public Service Camp, or for failing to report for induction, that the order to report upon which the indictment was based is void because they are ministers of religion and therefore exempt from all duty of training and service under the Selective Service and Training Act of 1940?

II.

If the defendants have exhausted all administrative processes, are they entitled to prove at a trial upon an indictment for desertion from a public service camp, or for failure to report for induction, that the order requiring them to report at camp is void for any of the following reasons:

1. That the order was issued in excess of the authority of the local board;
2. That said order was beyond the jurisdiction of the local board;
3. That the order so issued was contrary to law;
4. That said order was without support of substantial evidence;
5. That said order was contrary to the undisputed evidence;
6. That War Board acted arbitrarily and capriciously;
7. That said board acted contrary to the Constitution by depriving defendants of rights and liberty with-

out due process of law;

8. That said order was issued in violation of the Regulations of the Selective Service.

III.

Was it error for the trial courts to instruct the jury that the question of whether or not the local draft boards acted unfairly, capriciously or erroneously was not before them for consideration, and that the only question before the jury was whether the defendant had been classified in 4E and whether or not he left the Civilian Public Service Camp without proper authority?

IV.

Under the Selective Service and Training Act of 1940 does the local board or the appeal boards have authority to classify a registrant in classification 4E (Conscientious Objector) unless registrant claims that classification? Did not the said boards act in excess of their jurisdiction when they continued appellants in the 4E classification after appellants informed said boards that they were not conscientious objectors?

SPECIFICATION OF ERRORS TO BE RELIED UPON

In all three cases, defendants relied upon the point shown in the transcripts that the trial Court withdrew from the consideration of the jury, the question of whether or not appellants were entitled to a 4D classification, and thereby deprived appellants of their only

defense to the indictment.

In the Smith appeal the additional point is relied upon which is the fact as shown by the evidence and exhibits, that this defendant was denied due process by his local board in that they deprived him of his right of appeal to the appeal board as provided by the Selective Service and Training Act of 1940.

ARGUMENT

The civil administration of the Selective Service Act, terminates when a selectee who has been found to be a conscientious objector and placed in classification 4E, arrives at the camp to which he has been ordered by his local board. He is then entitled to a judicial review of his classification as a defense to indictment. When he is denied this defense, his trial becomes a mere sham, in which all defense is taken away from him. In such a trial, the consideration of the jury is limited to a fact admitted by the defendant that is: That he left camp without permission, so that the jury's decision is merely based upon defendant's admission and he is thereby deprived of his only defense, that is, that the order requiring him to report at camp and the regulations requiring him to remain at camp are void by reason of being based upon an improper classification which denied him his exemption as provided by the Selective Service and Training Act. Such a trial comes within the prohibition of the United States Constitution, because it becomes a Bill of Attainder and denies the defendant due process of law. Since the Falbo and Billings against Truesdell,

the Supreme Court has clarified its stand in the following cases:

Dodez vs. United States, U. S. No. 86
October Term, 1946, decided December 23,
1946.

Estep vs. United States, 327 U. S. 114.

Gibson vs. United States, ... U. S. No. 23,
Oct. Term, 1946, decided December 23, 1946.

Smith vs. United States, 148 Fed. (2d) 288, 327
U. S. 114.

Another fact for the Court to consider is that the selectees sent to Civilian Public Service Camps are under the law found to be conscientiously opposed to service in the armed forces, and in accordance with the statute, ordered to work of public national importance under Civilian direction, which meant that he was assigned to a Civilian Public Service Camp. All such camps, by order of the President, were placed under the jurisdiction of General Lewis B. Hersey, and although appropriations had been made therefore, and in spite of the law which provided that the inmates of Civilian Public Service Camps should receive pay and allowances at rates not in excess of those paid to persons inducted into the army, these boys were compelled under military direction of General Hersey and other army officers under him, to labor eight hours per day and six days per week without compensation whatsoever.

Congress no doubt placed the limitations upon the pay that they should receive for the reason that it realized the possibility of conscientious objectors receiving pay in excess of those serving in the armed forces, and

desired to thus limit the pay of conscientious objectors. The law does not provide for Civilian Public Service Camps which were created by regulations of General Hersey. Congress also provided in Sec. 301(B):

“The Congress further declared that in free society the obligation and privilege of military training should be shared generally in accordance with a fair and just system of Selective Compulsory Military Training and Service.”

Congress did not intend to discriminate against any person by reason of his religious training and belief. That discrimination was practiced only by the administration of the Act under the Selective Service System, and it is respectfully contended that the administration of the Act constituted a Bill of Attainder, prohibited by the Constitution.

“Among the Constitutional guarantees against abuse of Federal power thrown around the American citizen, are these three: 1. He cannot be punished until judicially tried.” . . . *Cummings vs. Missouri*, 4 Wall 277, 286, 18 Law Ed. 356.

It is respectfully urged that selectees in a public Service Camp, by the administration requiring them to labor 48 hours per week without compensation, administered punishment for the religious belief, by restraining them of their liberties, and separating them from their families as effectively as if they had been sentenced to a penal institution by judgment of the Court.

“It is not necessary that the persons to be effected by a Bill of Attainder be named in the Bill of Attainder in the 28th year of Henry VIII, against

the Earl of Kildare and others. He enacted that: 'All such persons which be or heretofore have been comfortors, abettors, partakers, confederates or adherents under said late Earl in his traitorous acts and purposes, shall and likewise stand and be attained, adjudged and convicted of high treason.' The Constitutional prohibition was intended to protect every man's right against that kind of legislation, which seeks either to inflict a penalty without trial or to subject a new penalty on old matter." *Cummings vs. Missouri*, 4 Wall, 277, 286 18 Law Ed. 356/

CONCLUSION

That the judgments of the Court below should be revised, and the trial Court ordered to dismiss the indictments, or in the alternative, new trials should be ordered.

Respectfully,

DELLMORE LESSARD,
Attorney for Defendants.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

GEORGE HENRY CLEVELAND,)	
Appellant,)	
vs)	No. 11276
UNITED STATES OF AMERICA,)	
Appellee.)	
ALEX L. PENOR,)	
Appellant,)	
vs)	No. 11274
UNITED STATES OF AMERICA,)	
Appellee.)	
WILLIS BERYL SMITH,)	
Appellant,)	
vs)	No. 11275
UNITED STATES OF AMERICA,)	
Appellee.)	

COMBINED BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Oregon.

HENRY L. HESS,
United States Attorney.
EDWARD B. TWINING,
Assistant United States Attorney.

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FOR THE NINTH CIRCUIT

GEORGE HENRY CLEVELAND,)		
	Appellant,)	
vs)	No. 11276	
UNITED STATES OF AMERICA,)		
	Appellee.)	
ALEX L. PENOR,)		
	Appellant,)	
vs)	No. 11274	
UNITED STATES OF AMERICA,)		
	Appellee.)	
WILLIS BERYL SMITH,)		
	Appellant,)	
vs)	No. 11275	
UNITED STATES OF AMERICA,)		
	Appellee.)	

COMBINED BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Oregon.

BRIEF FOR THE UNITED STATES

These are appeals from Judgments of the United States District Court for the District of Oregon, convicting the defendants—appellants of violating Section 11 of the Selective Service and Training Act of 1940, as amended, (50 U.S.C. App. 311).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended (50 U.S.C. App. 301 et seq.), provide:

SEC. 5 * * *

(d) Regular or duly ordained ministers of religion shall be exempt from training and service (but not from registration) under this Act.

SEC. 10(a) * * *

(2) * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe * * *

SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment * * *

The pertinent provisions of the Selective Service Regulations provide:

Sec. 627.2(a) The registrant * * * may appeal to a board of appeal from any classification of a registrant by a local board * * * (1) Within 10 days after the date the local board mails to the registrant a Notice of Classification (Form 57) * * *

Sec. 653.12 Assignees shall report to the camp to which they are assigned or transferred; remain therein until released or transferred elsewhere by proper authority * * *

QUESTIONS PRESENTED

1. Whether the appellants, who had not appealed from their Local Board's classifications, or had specifically accepted the classifications of the Board, had exhausted their administrative remedies.

2. If appellants were entitled to challenge their classifications in their criminal trials, whether they offered any evidence at the trials which would have warranted findings that their local boards had exceeded their jurisdiction in classifying them.

STATEMENT

A) The appellant in No. 11276, George Henry Cleveland, was indicted on October 17, 1945, charged with deserting Civilian Public Service Camp Number 128, LaPine, Oregon, on June 24, 1945. The entire file of the Selective Service Board was placed in evidence. No appeal was taken from the classification 4E given appellant by the Selective Service Board. Appellant remained in the Civilian Public

Service Camp from January 22, 1944 to June 24, 1945. Appellant testified as to his reasons for believing himself to have been a minister. No exception was taken to the instruction of the Court to the Jury when the case was tried.

B) The appellant in No. 11274, Alex L. Penor, was in the Civilian Public Service Camp from December 20, 1944 to June 11, 1945. He was twenty-one years of age at the time of the trial. The entire file of the Selective Service Board was placed in evidence. Appellant had been classified 1A originally by the Board, and after reporting for induction, had refused to be inducted. He was later offered a 4E classification by the Board, and appellant accepted the offer by telegram. He left the Civilian Public Service Camp and at his trial testified that he considered himself a minister of the Gospel and entitled to a 4D classification. Appellant objected to the instruction of the Court withdrawing from consideration of the Jury the question of appellant's classification by the Board.

C) The appellant in No. 11275, Willis Beryl Smith, was convicted under an indictment charging him with failure to report for induction. The entire file of the Selective Service Board was placed in evidence. Appellant reported for induction under an original classification of 1A, failed to qualify and was later reclassified 4F. Appellant was later given a reclassification of 1A and did not appeal from this classification. Appellant contended at the trial that he had been denied the right of appeal, and that he should

have been classified 4D. Appellant was nineteen years of age at the time of his trial and testified that he had become a minister of the Gospel at age thirteen. Appellant objected to the Court's instruction to the Jury withdrawing from the jurors' consideration the questions of whether or not appellant had been denied his right of appeal, and whether or not he had arbitrarily been denied classification of 4D.

ARGUMENT

I

The appellants did not exhaust their administrative remedies and therefore are not entitled judicially to challenge their classifications.

Cleveland did not appeal from the classification of 4E. (Tr. p. 23). No objection was made by appellant's counsel to the instructions of the Court to the jury. (Tr. p. 25). Under such circumstances, appellant would now have no cause to complain; nor could the Court examine the alleged arbitrariness of the classification by the Local Board, or submit the issue to the jury.

In the Penor case, the appellant, having refused to submit to induction, was offered a 4E classification in lieu of a reference to the United States Attorney. Appellant accepted the 4E classification by telegram. (Tr. p. 31).

In the Smith case, there was no appeal taken from the second classification of 1A. (Tr. p. 16, pp. 22-23).

Where, as in these cases, there has been a failure to complete the administrative remedy, or, as in the Penor case,

a specific acceptance of the Board's classification, it would appear to be conclusive that the trial Court did not err in refusing to submit to the jury any question concerning the Board's classification. We think that the doctrine of *Falbo v. United States*, 320 U. S. 549, applies in such instances.

II

The appellants offered no evidence which would warrant findings that their local boards exceeded their jurisdiction.

Aside from the fact that the appellants had not exhausted their administrative remedies and were not entitled to judicial review of their classifications, it is obvious, we submit, that the appellants offered no evidence at their trials that tended in any manner to impeach the propriety of the Local Boards' classifications.

The appellants' only offer of proof consisted of testimony as to their religious work. (No. 11276, Tr. pp. 19-22). (No. 11274, Tr. pp. 20-41). (No. 11275, Tr. pp. 19-21).

The entire Selective Service file of appellants was admitted in evidence.

A study of the proceedings at the trial discloses that no substantial evidence was offered by defendants in support of the contention that the Local Boards had exceeded their jurisdiction, or had acted arbitrarily. The appellants were permitted to testify as they wished, and there is no showing in these cases that the trial Court at any time refused evidence offered by the appellants in support of such a contention. Consequently, even though it be held that the

appellants could properly demand a judicial review of their classifications, it was not improper for the trial Judge to withdraw consideration of this issue from the jury under circumstances where no adequate proof had been offered of improper conduct by the Boards. We submit that in effect appellants offered no evidence which went beyond a mere quarrel with the decision of the Local Boards.'

We think that the language of the Court in *Estep v. United States*, 327 U. S. 114, p. 122, is controlling here:

"The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

In the Smith case, No. 11275, error is assigned as a result of the trial Court's instruction withdrawing from the jury the question whether or not appellant had been allowed an appeal from the Draft Board's classification. The record discloses that no appeal was ever taken in conformance with the Selective Service Regulations by appellant. (Tr. p. 16; Tr. pp. 22-23). Nor did appellant ever made a protest to the Board. (Tr. p. 16, pp. 22-23).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

HENRY L. HESS,

United States Attorney.

EDWARD B. TWINING,

Assistant United States Attorney.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

HAVILAH SMITH HAWKINS,	}	No. 11277
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

KEMPER NOMLAND, JR.	}	No. 11278
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

JOHN FRANK RANDALL,	}	No. 11279
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,	}	
<i>Appellee.</i>		

COMBINED APPELLANTS' BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

HAVILAH SMITH HAWKINS,	<i>Appellant,</i>	}	No. 11277
vs.			
UNITED STATES OF AMERICA,	<i>Appellee.</i>	}	
KEMPER NOMLAND, JR.	<i>Appellant,</i>	}	No. 11278
vs.			
UNITED STATES OF AMERICA,	<i>Appellee.</i>	}	
JOHN FRANK RANDALL,	<i>Appellant,</i>	}	No. 11279
vs.			
UNITED STATES OF AMERICA,	<i>Appellee.</i>	}	

COMBINED APPELLANTS' BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon.

JURISDICTIONAL STATEMENT

These cases on appeal are from judgments of conviction of appellants by the United States District Court

for the District of Oregon, and a jury had in each case. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, Subdivision (a), First and Third Subdivision (d), Section 723 (a), and rules of the Supreme Court of the United States.

STATEMENT OF CASES

Generally

These are criminal actions instituted in the United States District Court for the District of Oregon, by the return of indictments charging defendants with violation of the Selective Service and Training Act of 1940 as amended, and the regulations thereunder. The defendants are all conscientious objectors classified in classification 4E and assigned to Civilian Public Service Camps. They are charged with deserting Civilian Public Service Camps.

Specifically

(a) United States vs. Havilah Smith Hawkins. The defendant was indicted on June 14, 1945, charged with deserting Civilian Public Service Camp No. 56, Waldport, Oregon on April 26, 1945. He admitted leaving the camp, but contended at the trial that because General Hershey acted illegally in not complying with the law as enacted by Congress, by assigning defendant to work not of national importance, not paying defendant anything, though forcing him to work 8 1/2 hours per day and not furnishing food or clothing to defendant, (Tr. p. 24) reducing defendant to a state of serfdom; that de-

fendant is not required to comply with those illegal administrative orders.

(b) *United States vs. Kemper Nomland, Jr.* The defendant was indicted on June 14, 1945, charged with refusing to report to Civilian Public Service Camp No. 111, Mancos, Colorado upon order of Colonel Lewis Kosch, U. S. Army, after defendant had been assigned to and reported to Civilian Public Service Camp No. 56, Waldport, Oregon. The defendant contends that no evidence has been introduced proving beyond a reasonable doubt that defendant has not reported to Civilian Public Service Camp No. 111, Mancos, Colorado; that if a crime has been committed, it is in the State of Colorado, and the U. S. District Court for the State of Oregon has no jurisdiction, and that the order to transfer is a military order issued by an officer in the United States Army, contrary to the law passed by Congress, and, consequently, a void administrative order which defendant is not required to obey.

(c) *United States vs. John Frank Randall.* The defendant was indicted on October 17, 1945, charged with deserting Civilian Public Service Camp No. 128, LaPine, Oregon. Defendant contends there is no proper evidence before the Court upon which a conviction could be had, because the Selective Service File was improperly admitted into evidence over defendant's objection. (Tr. p. 18). Defendant also contends that his classification was improperly changed from 4F to 1AO and to 4E without legal notice and without opportunity of appeal. Defendant further contends that the Statutes were violated by the Administrator of the Civilian Public Service Camp,

General Lewis B. Hershey, United States Army, in that he was under military control, forced to labor without compensation, and discriminated against on account of his religious belief. Defendant contends he was denied his only defense set out herein by virtue of the instructions to the jury. (Tr. p. 38, 39). Defendant further contends he was subjected to slave labor, was made virtually a serf, and was subjected to punitive measures.

QUESTIONS INVOLVED

I.

Has the Director of Selective Service, General Lewis B. Hershey, authority to require conscientious objectors to remain in a Civilian Public Service camp without paying them the compensation provided by Section 309 (A), Title 50, App., United States Code?

II.

Does the restraint of conscientious objectors without statutory compensation in a Civilian Public Service camp by the Director of Selective Service, who is an officer in the U. S. Army, violate Amendment Thirteen of the Constitution of the United States?

III.

Does the confinement of conscientious objectors in Civilian Public Service Camps violate the First Amendment to the United States Constitution in that it denies liberties guaranteed by the Constitution to individuals on account of their religious beliefs by penalizing them?

IV.

Does a transfer of a conscientious objector from one camp to another by an Army Officer violate the Statute, Section 305, Title 50, U. S. Code Appendix, which provides for civilian direction?

**SPECIFICATION OF ERRORS TO BE
RELIED UPON**

I.

Failure of the Court to instruct the jury to bring in a verdict of not guilty.

II.

Failure of the Court to enter a judgment of not guilty, notwithstanding the verdict of the jury.

III.

Error committed by the court in withdrawing from the consideration of the jury all questions as to the legality of defendant's classification by their local draft board.

ARGUMENT

I.

In all three cases, defendants relied upon the point shown in the transcript that the trial court withdrew from the consideration of the jury the question of whether or not appellants were subjected to military orders, transfers, and controls. (Hawkins Tr. p. 34, 35; Nomland Tr. p. 36; Randall Tr. p. 38, 39).

In *United States of America vs. Americo Chiarito*, 69 Fed. Supl. p. 317, the Court decided:

"There is no claim here that the local Selective Service Board has assigned Chiarito to any other camp or directed him to report or remain in any other camp than No. 59. There was no proof as to who Colonel Kosch is, except that he is an officer of the regular army. There is no showing as to why he attempted to override the assignment by the local board and their order to accused to remain at Camp No. 59. Unless words are emptied of meaning, a military order by a colonel of the regular establishment to a conscientious objector against combatant and non-combatant service and so classified, is in direct violation of the language of the section which provides for assignment by civilians and direction in camp by civilians only. No delegation of authority could justify an action or regulation in direct defiance of the terms of the governing statute.⁹ The issuance of such an order laid no basis for prosecution anywhere.

"In further distinction it must be noted that accused is not a convicted criminal and subject to arbitrary disposal by the Attorney General. It is argued that if he had been classified and inducted into the armed services, he could have been ordered into any state, or abroad, and would have been punished if he had not obeyed. But the very thesis of this statute is that accused is a civilian and is by this law 'under civilian direction.' Whatever we think of the policy of the lawmakers, we must extend to accused the rights of a civilian and the guarantees of the Constitution even in time of war. Accused was bound to report to his local board and accept assignment to a camp. If he failed to report for assignment, or if he left the camp without per-

⁹ This is an entirely different problem from that discussed by some other courts. However, the process whereby regular army officers are permitted to issue regulations and orders to conscientious objectors who are placed by law under civilian direction savors not of rationalization but of perversion.

mission, he was subject to conviction.”¹⁰

A further consideration for the Court is the fact that selectees sent to Civilian Public Service Camps are found, under the law, to be conscientiously opposed to service in the armed forces, and are, therefore, ordered to work of public national importance under Civilian direction, in accordance with the statute. All such camps were placed under the jurisdiction of General Lewis B. Hershey by order of the President, and although appropriations had been made therefor, and in spite of the law which provided that inmates of Civilian Public Service Camps should receive pay and allowances at rates not in excess of those paid to persons inducted into the army, these men, under the military direction of General Hershey and other army officers, were compelled to labor six days per week and eight hours per day with no compensation whatsoever. (Hawkins Tr. p. 24; Randall Tr. p. 27). This virtually imposed serfdom upon appellants:

II.

“Serf: A person adscript to the soil and more or less subject to the will of the owner.” *

It is respectively urged that selectees in a public Service Camp, by the administration requiring them to labor 48 hours per week without compensation, administered punishment for their religious beliefs by restrain-

¹⁰ In order that there may be no misapprehension, the courts have enforced the Selective Training and Service Act consistently throughout the war. Heavy sentences were imposed on violators who failed to report for military service or for assignment to conscientious objector camps, as well as upon deserters from the latter. No person, however, should be deprived of his constitutional rights in a criminal case.

*Webster's Dictionary, Fifth Edition, G. & C. Merriam Co., Springfield, Massachusetts, 1946.

ing them of their liberties and separating them from their families as effectively as if they had been sentenced to a penal institution by judgment of the Court.

“It is not necessary that the persons to be affected by a Bill of Attainder be named in the Bill of Attainder in the 28th year of Henry VIII, against the Earl of Kildare and others. He enacted that: ‘All such persons which be or heretofore have been comforters, abettors, partakers, confederates or adherents under said late Earl in his traitorous acts and purposes, shall and likewise stand and be attained, adjudged and convicted of high treason.’ The Constitutional prohibition was intended to protect every man’s right against that kind of legislation, which seeks either to inflict a penalty without trial or to subject a new penalty on old matter.” (*Cummings vs. Missouri*, 4 Wall, 277, 286 18 Law Ed. 356).

In all three cases, appellants contend that by being sent to the Civilian Public Service Camps under the conditions prescribed by the director of Selective Service, General Lewis B. Hershey, they were deprived of their liberties by legislative action and without jurisdictional trial, and that such action violates the Constitution of the United States:

“A bill of attainder is a legislative act which inflicts punishment without a judicial trial. (U.S. - *Butcher v. Maybury*, D. C. Wash., 8 F. 2d 155). It may be directed against an individual by name or against a whole class, (U.S. - *Cummings v. Missouri*, Mo., 4 Wall. 277, 18 L. Ed. 356 - Ex. p. Law D. C. Ga., 15 F. Cas. No. 8, 126, 35 Ga. 285,) and may inflict punishment either absolutely or conditionally. (U.S. - *Cummings v. Missouri*, Mo., 4 Wall. 277, 18 L. Ed. 356)” (16 *Corpus Juris Secundum*, Section 452).

"A bill of pains and penalties is a legislative act which, without a judicial trial, imposes a punishment less than death; (U.S. - Drehman v. Stifle, Mo., 8 Wall. 595, 19 L. Ed. 508.) and such bills are within the constitutional prohibitions against bills of attainder. (U.S. - Drehman v. Stifle, Mo., 8 Wall 595, 601, 19 L. Ed. 508)" (16 Corpus Juris Secundum, Section 455).

"While ordinarily accounts of attainder were directed at some person or persons designated by name, it seems that they were occasionally directed against a whole class of persons who could be easily ascertained from the descriptions of such persons given in the acts." (Lovett vs. United States, 66 Supreme Court 1073) Ore. Law Rev., Feb. 1947, Bills of Attainder, P. 78.

In the Randall appeal, he was deprived of his right of appeal from the classification given him by his local draft board, in that he was never notified of his change of classification from 4F to 4E (Tr. p. 23). He was thereby denied due process, which is guaranteed by Amendment Five of the Constitution of the United States.

CONCLUSION

The judgment of the Court below should be reversed and the trial court ordered to dismiss the indictments; or in the alternative, new trials should be ordered.

Respectfully,

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Attorney for Defendants - Appellants.

In the United States
Circuit Court of Appeals
for the Ninth Circuit

HAVILAH SMITH HAWKINS,)	
Appellant,)	
vs)	No. 11277
UNITED STATES OF AMERICA,)	
Appellee.)	
KEMPER NOMLAND, JR.,)	
Appellant,)	
vs)	No. 11278
UNITED STATES OF AMERICA,)	
Appellee.)	
JOHN FRANK RANDALL,)	
Appellant,)	
vs)	No. 11279
UNITED STATES OF AMERICA,)	
Appellee.)	

COMBINED BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Oregon.

HENRY L. HESS,
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IN THE UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAVILAH SMITH HAWKINS,)	
Appellant,)	
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vs)	No. 11278
UNITED STATES OF AMERICA,)	
Appellee.)	
JOHN FRANK RANDALL,)	
Appellant,)	
vs)	No. 11279
UNITED STATES OF AMERICA,)	
Appellee.)	

COMBINED BRIEF OF APPELLEE

Upon Appeal from the District Court of the United States
for the District of Oregon.

BRIEF FOR THE UNITED STATES

These are appeals from Judgments of the United States District Court for the District of Oregon, convicting the defendants—appellants of violating Section 11 of the Selective Service and Training Act of 1940, as amended, (50 U.S.C. App. 311).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act of 1940, as amended (50 U.S.C. App. 301 et seq.), provide:

SEC. 10 (a) * * *

(2) * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe * * *

SEC. 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment * * *

The pertinent provisions of the Selective Service Regulations provide:

SEC. 653.12 Assignees shall report to the camp to which they are assigned or transferred; remain therein until released or transferred elsewhere by proper authority * * * comply with any order to transfer from

one camp or project to another, and leave the camp or project from which they are transferred and proceed and report to the camp or project to which they are transferred in accordance with such orders * * *

QUESTION PRESENTED

Whether the record of these cases discloses any evidence of illegal or arbitrary classification or infringement of appellants' legal rights.

ARGUMENT

The transcript of evidence and exhibits in these cases clearly disclose that all of the appellants claimed to be Conscientious Objectors, asked for the classification of 4E, and received that classification. There is no evidence of any other contention on the part of the appellants before they were classified, and they reported at Civilian Public Service Camps and remained there for a long period of time. It is apparent that the real basis of the appellants' contention is that they do not approve of the Selective Service Act and did not desire to conform to its provisions. In view of the complete lack of any evidence indicating improper conduct on the part of the Draft Boards, or any other person or persons, it is difficult to imagine how the trial court could have directed a verdict of not guilty, or could have submitted any question concerning the classification of appellants. No objection whatever was made to the trial court's instruction to the jury.

The Public Service Camps were established in accordance with law. The utilization of persons holding regular Army Commissions in the over-all administration affecting Conscientious Objectors was in no way an interference with any right of appellants under the Act. *Kramer v. United States*, 147 F. 2d 756, certiorari denied, 324 U. S. 878, and *Roodenko v. United States*, 147 F. 2d 752, certiorari denied, 324 U. S. 860.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

HENRY L. HESS,

United States Attorney.

EDWARD B. TWINING,

Assistant United States Attorney.

No. 11308

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

**NYE & NISSEN (A CORPORATION) AND ABRAHAM
MONCHARSH, APPELLANTS**

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION**

BRIEF FOR APPELLEE

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PAUL P. O'BRIEN

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 11308

NYE & NISSEN (A CORPORATION) AND ABRAHAM MON-
CHARSH, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR APPELLEE

STATEMENT ¹

In order to inform the Court with definiteness of the more important evidence offered and received at the trial in the District Court, it is deemed important to make an extended statement embodying a considerable amount of detail of the testimony of a number of witnesses relating to both the conspiracy count (count 1) and to the substantive counts (counts 2 to 7) of the indictment. This is done in order to show the Court that the evidence in the case establishes the

¹ Throughout this brief, in the interest of brevity, the following frequently appearing names are abbreviated as follows:

United States Army and War Department—"Army";

United States Navy and Navy Department—"Navy";

War Shipping Administration—"WSA";

United States Department of Agriculture—"USDA."

guilt of the appellants by the most overwhelming and incontrovertible proof.

This case comes under the category of "War Frauds," and involves charges of fraud upon the United States in connection with contracts for the supplying of food products. The defendant corporation, under the dominating influence of the defendant Moncharsh, had been engaged for many years in the sale, on a large scale, of eggs, butter, and cheese to the Army and the Navy and to shipping companies operating fleets of ships from the port of San Francisco. It maintained warehouses and gathering depots for eggs in a number of places contiguous or conveniently located to its principal place of business in San Francisco where orders were received and deliveries made at the waterfront and at Army depots there and in Oakland. Shortly after the attack on Pearl Harbor and the commencement of the war the Government took over the control and operation of all ships adapted to the shipment of troops and supplies, and created the War Shipping Administration for the supervision and financing of such control and operation.² The WSA, under its authority, thereupon entered into general agency contracts with the various shipping companies whereby these companies continued to operate the ships under orders of the WSA, and as such general agents they were supplied severally by the WSA with revolving funds from which all expenditures were paid for maintenance,

² U. S. C., Title 50 Appendix, Sec. 1295, and Executive Order No. 9054, issued February 7, 1942.

wages, supplies and other cargo, including the purchase from the defendant company of eggs, butter, and cheese for the provisioning of the crews during the ships' voyages and also to supply the troops when the ships were utilized as troop-carriers.³

The indictment is in seven counts, the first charging conspiracy to defraud the United States (18 U. S. C. 88) and the last six charging the substantive offenses of making false claims against the United States based on fraudulent invoices for food products, namely, eggs and cheese (18 U. S. C. 80).⁴

In appellants' brief, pages 3 to 9, they give a somewhat abbreviated description of the indictment which seems to be sufficient for the purposes of the appeal. There is a minor error on page 4 which gives the alleged duration of the conspiracy as "from January 1, 1938, until June 20, 1946." The latter date should be 1945. This mistake is due to a typographical error in the printed record at page 26, which shows the filing date of the indictment as June 20, 1946. The trial of the case was completed before that date and the error is obvious. Otherwise the appellee adopts this description of the indictment except as hereinafter enlarged.

It should be observed at the outset that the guilt of Berman and Goddard is practically admitted by appellants' recital of the evidence. Not only were these

³ This practice and routine are explained by the testimony of several witnesses who were executives of shipping companies, e. g., testimony of Hugh Gallagher, Vice-President of Matson Navigation Co., Record pp. 1426-1441.

⁴ These sections of Title 18 are quoted in full in the appendix.

two convicted by the jury and sentenced by the Court, but no appeal was instituted by them. It is to be noted further that they were represented by the same counsel who, in their behalf, elected to let the judgment stand without effort for review, and to place their reliance, on behalf of Moncharsh and the corporation, on a claim that the evidence was insufficient to bring the latter into the ambit of guilt which had been amply and conclusively proved as to the former. Thus the entire flavor of the appeal is to saddle upon the subordinate employees the entire burden of a series of crimes of which the appellants were not only the beneficiaries but the guiding force.

The cruel and arrogant attitude of Moncharsh in permitting his subordinates to take the blame and the burden of imprisonment without appeal became apparent at the time of sentence, when he alone sought to be enlarged on bail pending appeal. The Court was so obviously shocked at this selfish disregard by Moncharsh of the interests of his fellow convicts that it was considered as a substantial ground, among others, for denying the application for bail (R. 4434-4435).

THE EVIDENCE TO PROVE THE CONSPIRACY ALLEGED IN COUNT I

The first count of the indictment charges that during the period from January 1, 1938, to June 20, 1945, the defendants conspired to defraud the United States. The means and manner of practicing and effectuating this fraud are described in the indictment with great definiteness (R. 4-8) but for the sake of

brevity and clarity they may be paraphrased as follows:

The defendants conspired to sell to the United States inferior products (i. e. eggs, butter, and cheese)—

(1) By false grading, weighing, and packing and by fraud and deception practiced upon the inspectors, graders, and agents of the Department of Agriculture, the War Shipping Administration, and the Army and Navy, thus impeding and defeating the lawful functions of those governmental agencies, and

(2) By circumventing and avoiding the standards, grades, weights, and specifications to which said purchases are subject by means of false and fictitious inspection, grading, and weighing; by the prevention of honest and accurate inspection, grading and weighing by said representatives; and by other tricks, schemes, devices, and concealments.

It is important to note that following the above generalizations the indictment mentions thirteen specific methods which illuminate the “tricks, schemes, devices, and concealments” planned by the defendants in carrying out their fraudulent purpose. Thus it is alleged that the defendants—

(a) Would secretly place stamps, falsely indicating inspection and grading by inspectors and graders of USDA and Army, upon cases of eggs which had not been officially inspected or graded;

(b) Would prepare sample cases of eggs which were of a higher grade than the lot that were to be inspected and graded, and submit

these sample cases to the inspectors and graders instead of the cases designated by the latter, many of these lots of eggs being then delivered to the WSA and the Army;

(c) Would repeatedly cause the inspectors and graders to inspect and grade the same case of eggs, which contained a higher grade of eggs than the remainder of the lot being inspected, instead of submitting for such inspection the cases designated by the inspectors;

(d) After cases of eggs had been inspected, graded, and stamped by inspectors, would remove the stamps and resubmit the same cases for further inspection.

(e) After cases of eggs had been officially inspected, graded, and stamped, would remove the eggs from the cases and replace them with eggs of an inferior grade.

(f) Upon rejection of a delivery of eggs by the WSA or the Army because the eggs were not of the quality represented, would rearrange the lot and redeliver the same eggs, falsely representing them to be different eggs;

(g) Would mix cases of eggs which had not been inspected with cases of eggs which had been officially inspected, graded, and weighed and deliver them to the WSA, falsely representing the whole lot as having been officially inspected, graded, and weighed;

(h) Would mix cases of eggs of a lower quality and weight with a lot of eggs of a higher quality and weight, and deliver the mixed lot to WSA and the Army, falsely representing the grade and weight of the entire lot;

(i) Would misrepresent the grade, weight, and price of eggs delivered to the Army and to WSA;

(j) Would cut underweight butter to be inspected, graded, and weighed by inspectors and graders of the Army, conceal this fact from the inspectors, and submit for their inspection and weighing prints of butter specially cut to conform to the required weights;

(k) Would recut butter previously rejected by the Army Inspectors and in their absence so commingle it with inspected butter that it was accepted by the Army;

(l) Would misrepresent the weights and prices of butter sold to WSA and the Army;

(m) Would misrepresent the weights and prices of cheese sold to WSA.

In furtherance of the conspiracy five overt acts are alleged. These are described on page 6 of the appellants' brief.

All of the foregoing recitals of purpose and of fact touching the allegations of the first count were amply proved; indeed, they were proved by overwhelming and conclusively convincing evidence. The testimony of the more important witnesses for the Government in proof of the allegations of the conspiracy will now be given in some detail.

The Testimony of Henry L. Pineda

This witness by his testimony proved every allegation of the indictment relating to the conspiracy count with the sole exception of the last of the thirteen specific methods of perpetrating the fraud, which refers to misrepresenting the weights and prices of cheese (R. 8). He also proved overt acts A and C alleged in the indictment (R. 8, 9). Thus, with the testimony of Pineda alone, the evidence was sufficient

to take the case to the jury, without the corroboration and support which other testimony supplied.

At the time of the trial Pineda was a young man apparently about 35 years old. He was employed by Nye & Nissen for about nine years, beginning about 1934 and extending to October of 1942. In February of 1943 he returned to their employ and remained for about five weeks. His duties during the whole period were those of a general utility man in the plant, working as a laborer in the breaking room where eggs were broken into cans, assisting in the candling room and in the butter room, and working on the floor storing eggs and placing them where told. Also at times he drove a small truck and helped on the trucks in making deliveries (R. 444, 445).

The witness described the apparent functions of Moncharsh as he observed them during the course of his employment. He stated that Moncharsh had charge of the plant and came down from his office frequently and gave Goddard orders. If anything went wrong or anything had to be done, Moncharsh was the man to give the final word. Deliveries of eggs to the warehouse were under the supervision sometimes of Moncharsh and sometimes of Goddard, and when an order was to be filled it would come from Moncharsh to Goddard, who, in turn, would pass the order to other employees (R. 446, 460, 461). Again, on page 489 of the record, Pineda stated that Moncharsh came to the floor of the warehouse every day, usually about 10 or 11 o'clock in the morning and again about 4 o'clock in the afternoon.

Pineda further describes the functions of the other employees, including the defendants Berman and Goddard. Goddard was shipping clerk and general foreman of the main warehouse, and received his orders from up in the office. He supervised the receipt and delivery of eggs, butter, and cheese. Berman's duties were largely subordinate to Goddard's in connection with the filling of orders and directing the truck drivers in connection with deliveries (R. 447-452).

The witness described the plant in detail, and in particular the candling room, which was used by the girl candlers and also by Government inspectors both of the Department of Agriculture and the Army in making examinations and inspections of eggs. This candling room was at one end of the warehouse and had an outer wall coming up about four feet from the floor, with a bench extending the length of the room. Above this bench were 10 lights or candles for 10 girls. Above the bench was a curtain to exclude the light. This curtain was in strips so that a case of eggs could be shoved in without lifting the whole curtain. The bench was about six feet wide so it would hold two cases of eggs lengthwise (R. 454, 455).

The witness described the manner in which egg cases were labeled: blue labels for large eggs, green for mediums, and black for the pullet or peewee eggs. Eggs that were of low grade were indicated by different labels so that from these paper labels the character of eggs could readily be identified (R. 460).

In the course of his testimony Pineda recited the details of a number of episodes occurring during the

course of his employment which demonstrated the deceit practiced in connection with the inspection of eggs by Government inspectors both of the Department of Agriculture and of the Army. One of these episodes occurred in the summer of 1941. In his testimony there was some confusion as to the year in which this occurred but it was finally fixed with definiteness as being in June of 1941, and he stated that the confusion of dates was due to the fact that there were so many similar occurrences all during the period of his employment, that definite dates were difficult to give (R. 481). Witness stated that he had been working in the breaking room and was called out to take over Menges' job on his bench, and Moncharsh, Goddard, and Menges went into a conference about a particular order which was to go into cases with no labels on them. Pineda knew this was a Government order because Army inspectors came and inspected the eggs. He was close enough to Moncharsh, Goddard, and Menges so that he could hear the discussion among them. These instructions were that the girl candlers make up certain sample cases, with the "cut-outs" all to go in other cases but in the same type of case, the only eggs to be excluded being black rots and leakers (R. 463-466). These terms were explained by the witness as follows: when eggs are candled the grade A mediums would be segregated to be used as samples for inspection by the Government men, and all the inferior eggs would be put in other cases and those were denominated "cut-outs" (R. 467, 468). Pullet and pewee

eggs were defined by the witness as eggs below any acceptable size, the grades for sizes being "large," "medium," and "small." The minimum weight of small eggs as established by Government regulations was 34 pounds for the 30 dozen eggs in a case, and the peewees or pullets would therefore be less than that minimum weight. The minimum required weight of large eggs was 45 pounds, and of medium eggs 40 pounds (R. 514, 515).

The witness stated that the entire shipment of eggs involved in this transaction had been brought in from the Petaluma plant of Nye & Nissen, but had not been candled before arriving in San Francisco. Upon being candled they were placed in separate cases as above described, and the cases containing good eggs and referred to as sample cases were given a particular mark so that they could be identified. In accordance with these instructions from Moncharsh, the eggs were candled and segregated into sample cases and cut-outs, with identifying marks on the sample cases so that if for inspection purposes the Government inspectors selected one of the bad cases the employees could switch it away and substitute one of the sample cases so that only the good eggs would be inspected and approved. Inspection by Army officers then followed, and upon the sample cases submitted to the inspector being approved, all the cases were given the Government stamp, with the result that at least half the cases, which were destined for overseas shipment or to the Presidio, contained inferior eggs. Operations of this character were corroborated in the

later testimony of Colonel Hand, Army inspector, who found bad eggs in deliveries both to the Presidio and to Letterman Hospital (R. 396-407). Eggs for overseas shipment were not given a second inspection before being loaded on ships (R. 423), with the result that the soldiers overseas received a large percentage of bad eggs although all bore the Government stamps. It further appears from the later testimony of the witness (R. 891-895) that after the good grade A eggs contained in the sample cases had been stamped by inspectors, either of the Army or USDA, on instructions the employees would transfer the good eggs contained in the sample cases into other cases and substitute cut-outs for an entire shipment. This occurred particularly in cases that were delivered to WSA boats carrying cargo for overseas, these eggs being for the use of the crew during the voyage.

In the ordinary course of candling eggs and separating the acceptable eggs from cut-outs, the witness testified that eggs of different qualities would be placed on trays containing about 30 cases to a tray and these were placed in different locations in the warehouse so that they could easily be identified in loading the trucks for delivery, all the sample cases being put in one place, the cut-outs in another, and the peewees or pullets in another (R. 487-489).

In connection with this episode the witness testified that it took two or three days to finish putting up the order, after which Goddard called up the Army inspectors to come and inspect the eggs. The handling of the eggs upon the arrival of the inspector was a

matter of routine about which the witness had received repeated instructions during the course of his employment, and this routine was followed by the witness and other employees to the end that the Army inspector would examine and candle eggs only from the sample cases (R. 493). In this same connection Pineda testified that it was a common practice under instructions from his superiors to deceive the inspectors in the following manner. A sample case would be pushed into the candling room through the curtains where the inspector was working, who would then examine only the eggs in one-half of the case. Having found the eggs satisfactory by this examination he would shove the case out through the curtains, and thereupon the employees would turn the case around and shove the other end into the inspector, who, without detecting the deceit, would examine these eggs under the supposition that he was inspecting a second case (R. 498). After this process of inspection, the inspector then counted the cases prepared for the complete shipment and on the strength of his "spot" inspection placed the Government stamp on all the rest of the cases, most of which were cut-outs (R. 499, 500). In connection with this episode and also other instances of a similar character, Pineda mentioned the name of the Government inspector as Colonel Foster. It later appeared that the witness was mistaken in the name of the inspector and changed his testimony so as to substitute the name of Colonel Kielsmeier (R. 1294, 1295).

The defendants in their brief, on page 30, attempt to make much of this confusion of names on the part of

Pineda. As a matter of fact, however, it was an entirely reasonable mistake. Both Colonel Foster and Colonel Kielsmeier had served as Army inspectors at the Nye & Nissen plant, and it is not surprising that after a lapse of several years the witness should confuse one with the other. In the record at pages 1294 to 1296 Pineda corrected this error.

Pineda described another method of deceiving Colonel Kielsmeier, who came to the Nye & Nissen plant very frequently to inspect eggs. It was the Colonel's custom, after selecting cases to be inspected, to mark these cases with a brush and ink. He would then go into the candling room, and the employees would pass the cases in to him successively. Whenever in selecting these cases for inspection he thus marked a case of cut-outs, either Pineda or Menges, on instruction from Goddard, would substitute for the case of cut-outs a case containing good eggs (a sample case) and would then mark this with a brush and ink in the same manner used by Colonel Kielsmeier. This was done while the Colonel was in the candling room and unable to observe what was going on. The brush and ink used by the employees in this deception were supplied to them by the defendant Goddard.

Before they got the new brush and imitated Kielsmeier's mark the practice was adopted of taking the labels off the cases which Kielsmeier had marked with his brush, when these cases contained cut-outs, and pasting these labels on cases with good eggs in them. This was an unsatisfactory method and took so much time that it became necessary to get a similar brush and ink so as to avoid removing the labels.

In connection with Colonel Kielsmeier's inspection, Pineda testified that on one occasion the Colonel brought a soldier with him to remain outside the candling room where he could watch and see that the proper cases of eggs were passed to him in the candling room. In order to dispose of this soldier while they were switching cases on Kielsmeier, Goddard told the soldier that his car was in the way and instructed him to go out and move it. In the meantime, Pineda and Goddard replaced the cut-out cases with sample cases (R. 493-495, 818-820, 824-826, 829, 830).

The witness described the manner of handling peewee or pullet eggs. This is significant in considering the testimony relating to the substantive counts of the indictment where it appears that such unacceptable eggs were delivered to ships of the WSA and charged to the Government as medium or large eggs.

It appears that when the candlers segregated cases of peewees or pullets, it was customary to put a little card on the top of the eggs containing the penciled word "peewee" or "cut-out." When such a case was passed out of the candling room it was customary for the employees to remove this card and, after nailing a top on the case, the letter "P" would be placed on the label either with pencil or with a rubber stamp. The label used on such cases was a green label, containing the words "Thirty Dozen Medium," a clearly premeditated deception. It sometimes occurred that in placing the top on a case the employees inadvertently left the peewee or pullet card where the candler had placed it on top of the eggs, and Pineda identified seven such cards, exhibits 36 to 42, which were later

identified by witnesses who had removed them from egg cases delivered to WSA ships (R. 508-513). Pineda also stated that they had a place on the floor where peewee eggs were always stacked. This is important in connection with the testimony of the truck driver Nystrom who told of instructions from Goddard to load peewees on his truck for delivering to WSA ships, in which Goddard directed him to this particular place where they were stored.

The witness described an incident which occurred in February 1941 when a lot of fresh eggs were placed outside the candling room for inspection by Colonel Hand of the Army. Colonel Hand selected at random certain of these cases which he wanted brought into the candling room where he could examine them. While this was being done the remainder of the eggs were moved into the cooler and the same number of storage eggs were brought out and placed where the others had been on the floor. After Colonel Hand had candled the eggs which he had designated and found that they were of the desired grade he came out of the candling room and, under the assumption that the eggs there were of the same grade as those he had inspected, placed his seal or stamp on all of them. The only cases of good eggs that he stamped were the seven or eight cases which he had actually candled. Moncharsh was on the floor the day before this inspection and he instructed Pineda and the other employees to do a good job because Hand was going to inspect that order. Three or four days later Colonel Hand came in to inspect another Army order

and the same eggs which he had previously approved were again submitted to him for candling. In the same manner as previously, storage eggs were substituted for the fresh eggs which Colonel Hand had approved. By repeating this process, Colonel Hand inspected the same lot of eggs five or six times (R. 785-812).

On an earlier occasion in the latter part of 1938, Pineda testified, while he, Nix, and Andrade were eating their lunch in the warehouse the defendant Moncharsh came down from the office and complained about an Army order that had been rejected by inspectors. In answer to Moncharsh's complaint, Nix said to him, "We used these same egg samples for a long time and they're old as the hills." Moncharsh replied in a jocular tone, "You can't go by eggs. Don't forget, in wine the older it gets the better it is." Defendant's counsel objected to this testimony but the Court admitted it on the basis that it showed knowledge on the part of Moncharsh of the fact that inspection of the same eggs was made over and over again (R. 841, 842).

At considerable length (R. 843-851) the witness described a counterfeit stamp in imitation of the Department of Agriculture stamp then in use which was secured by Nye & Nissen and kept in Goddard's possession. It was secured about 1935 and used from time to time until in 1939 when the Department of Agriculture changed its stamp and also changed its method of indicating the quality of eggs. Thereafter, the counterfeit stamp could no longer be used. This

stamp was utilized by Pineda and by the defendants Goddard and Menges to stamp cases that had not been inspected and which contained inferior eggs. It was kept in a wooden box in the upstairs office, and Pineda testified that he had seen it used forty or fifty times in thus fraudulently marking cases of eggs that had not been inspected. As hereafter appears, the witness Andrade testified to the use of this counterfeit stamp, and stated that he had also seen the defendant Moncharsh use it (R. 3258, 3259).

In connection with the routine stamping of egg cases by the Army inspector, Pineda testified that on occasion the inspector would hand the stamp and pad to him or to Goddard to stamp cases which the inspector had approved. On occasions of this sort, Goddard and Pineda stamped a lot of loose labels while the Army inspector was not looking. These were kept on a shelf in the butter room and later applied to cases containing inferior eggs. Also when the inspector was not looking they stamped cases of eggs that did not belong to the lot which the inspector had approved (R. 882-884).

Pineda also described the custom of buffing and scraping stamps off the cases. After eggs had been inspected and the cases stamped, the stamps would be buffed off and the same cases passed to the inspector in the candling room for another inspection. This was but another method of deceiving the inspector and was practiced in connection with inspections by Moosman, USDA inspector, and the witness referred particularly to an occasion in January of 1942 when

this occurred. He stated that Goddard told him to make sure that the scrapings did not get into the cases because Moosman was coming again the following day to inspect them, and Pineda watched this second inspection of these same eggs. He further stated that the same process of stamping and buffing again occurred, so that Moosman inspected the same eggs three times (R. 884-888).

Another fraudulent practice described by Pineda related to the switching or transferring of eggs from one case to another. When a considerable number of cases of good eggs had been inspected, approved, and stamped, and after the inspector had left, the eggs would be transferred to unstamped cases and inferior eggs put in their place. The witness described one occasion about November of 1941 when a number of employees were called upon to work in the evening to switch eggs from a large number of cases. All the defendants, including Moncharsh, were present, besides Pineda and several of the girl candlers. In doing this work the defendant Moncharsh himself started transferring some of the eggs but he was too awkward and slow and finally stopped and helped in replacing the covers on the cases (R. 891-895).

In connection with the grading, weighing, stamping, and inspection of butter, Pineda described an occasion in February of 1942 when butter was being inspected by Colonel Hand. He stated that eight or ten thousand pounds of butter were involved in this transaction. Colonel Hand and his inspectors scored the butter by examining one sixty-pound cube of

every churn, and upon this inspection certain churn numbers were rejected and set apart and those that were accepted were taken out of the cooler and brought to the butter cutting room. Colonel Hand arrived at about 8 o'clock in the morning but before that time, under instructions from Goddard, the employees had cut a quantity of the rejected butter. After their arrival the butter was cut in their presence, but whenever they were not in the immediate vicinity of the butter cutting machine Pineda, again under instructions from Goddard, cut the butter short weight by one ounce per pound. This was done by manipulating a handle at the butter cutting machine. This whole process is completely described by witness, who gave the details of the method whereby the inspectors were deceived and the manner in which inferior butter and short weights were imposed upon the Army inspectors (R. 903-915). The date of this occurrence is fixed with absolute certainty by Pineda because it was a few days after his wife had given birth to a child (R. 917), and corroboration to an extent was supplied by the testimony of Captain Mencimer, who testified to the discovery of short weight butter which had been delivered to the Army (R. 3115-3124).

In the foregoing recital of fraudulent practices observed and participated in by Pineda, we have only touched the high spots of his testimony, which contains many more similar occurrences. We have attempted only to show a pattern of fraud which is thus demonstrated, without unnecessary extension of this statement.

In his testimony Pineda told an amazing story of fraud and deception in which all the defendants, including Moncharsh, were active participants. His testimony extended for days, with spirited and extended objections by defendants' counsel which prolonged it considerably, followed by a searching cross-examination extending more than five days which only served to accentuate and confirm the frankness and honesty of the witness. His demeanor on the witness stand carried to the jury his apparent effort to give a truthful account of a continuing pattern of fraudulent conduct. His appreciation of his own participation in this dishonesty obviously spurred him on to tell as complete a story as his memory allowed, without attempting to evade or minimize his own guilty knowledge that fraud was being committed. Altogether his testimony was most impressive and convincing of the defendants' guilt.

The Testimony of Adam Thomas Andrade

The testimony of this witness definitely connected the defendant Moncharsh and all the other defendants with the conspiracy alleged in the first count of the indictment and corroborated the testimony of Pineda in establishing the pattern of fraud which runs throughout the record. He was employed at the Nye & Nissen plant from 1931 until November of 1940. He drove a large truck with a capacity of 150 cases of eggs, and in addition thereto did a large amount of work in the plant consisting of ordinary labor and including the relabeling of egg cases, helping with inspections, and at times candling eggs and working in

the butter room and the breaking room. Aside from driving the truck his duties were exactly the same as those of Pineda. (R. 3220-3221.)

Beginning in 1935 and continuing thereafter as long as he was in the company's employ he often saw in the possession of the defendants and other employees, and including the defendant Moncharsh, a rubber stamp similar to the stamp used by the Department of Agriculture inspector. In connection with the use of this stamp in fraudulently affixing it to egg cases, he referred to it as a "counterfeit" stamp. (R. 3221-3222.) The use of this word was objected to by defense counsel, and the Court struck it from the record. In connection with Pineda's testimony, as outlined in this brief, we have used the word "counterfeit" because it seems appropriate and properly descriptive of the stamp. In the appellants' brief they refer to the stamp as the "alleged spurious stamp" and they seem to prefer that term. Webster's dictionary gives these two words as synonymous. Andrade recounts numerous instances when this stamp was in the possession of Moncharsh and in use by him in affixing it to cases containing inferior eggs which had not been inspected, and it was thus in use, according to his testimony, until he left the company's employ. Its frequent fraudulent use by the defendants is exemplified by Andrade's statements that he saw the stamp in the possession of Goddard "on various occasions, maybe twice a day" during the period of his employment (R. 3225). The witness stated that this stamp when first used was kept in the possession of Goddard in his office on the floor

of the warehouse and later was kept in the upstairs office and located in the safe.

In his testimony Andrade gave the details of various incidents that occurred during his employment which were illustrative of the character of fraud that was habitually practiced by the defendants. One of these incidents related to the delivery of a full truck- and trailer-load of 749 cases of eggs in the summer of 1938 to Fort Mason at the United States transport docks. This load was coming from Petaluma, driven by another truck driver named Smiley, and Andrade was instructed by the defendant Goddard to accompany Smiley in delivering these eggs. He was further instructed that Smiley would tell him how to unload the eggs so that the inspectors could be induced to examine only the sample cases which were to be placed on top of the other cases. He stated that this load consisted of cut-outs with the exception of a few sample cases on the top of each stack. (R. 3229-3234.)

Andrade recounted another instance in the latter part of 1939 when a Navy order of 1,000 cases of eggs were hauled to Pier 56. The time is clearly identified as being just after the beginning of World War II on September 1, 1939. This 1,000-case order was delivered to Pier 56 by Andrade in loads of 150 cases each and was subjected to inspection by Moosman USDA inspector, at the Nye & Nissen plant, but it appears that there was also on occasion a spot inspection at the pier. The whole 1,000 cases had been stamped with the counterfeit stamp while the order was being put up. Inspector Moosman came to the

plant about twice a day for a period of a week in making the inspection. In each instance he inspected a flat of eggs containing 30 cases by candling a number of them. The inspector then put his stamp on all the 30 cases, but after he left, the stamps were removed on the order of Goddard or Berman or Moncharsh by scraping the label with a hand scraper or by an electric buffer, and then the cases were relabeled. Thirty cases of uninspected eggs were then stamped with the counterfeit stamp, and upon Moosman's next arrival there would be submitted to him for inspection the same 30 cases which he had examined previously. Upon these being approved and stamped by the inspector, the employees again buffed off the stamps, 30 cases of uninspected eggs were stamped with the counterfeit stamp, and again the same 30 cases previously inspected would be submitted to Moosman. Andrade was unable to say how many times Moosman inspected the same eggs after the stamps had been removed, but he stated definitely that the same eggs were inspected more than once (R. 3234-3244).

Another similar incident occurred in connection with a shipment of eggs to the Navy consisting of 500 cases. These were inspected by Moosman, and as in the other instances 30 cases were inspected, stamped, and the stamps buffed off, with Moosman again repeatedly inspecting the same eggs. Andrade testified that in the course of this operation, after Moosman had left the plant and Moncharsh himself was in the act of stamping 30 cases with the counterfeit stamp, Moosman returned unexpectedly. When Moncharsh

turned around and saw Moosman he hurriedly stuck the stamp in his pocket. On that occasion Jack Smith, the vice president of Nye & Nissen, was present, and Andrade overheard the following conversation between Smith and Moncharsh. Smith said, "Abe, if you don't cut this kind of business out you are going to get all of us in the penitentiary. You are going too far." Moncharsh replied, "What is the matter with you guys? Are you afraid? These guys don't know nothing anyhow." There was more said on this occasion but in language which the witness did not care to repeat (R. 3256-3259).

Andrade gave the details of an occurrence in the middle of 1939 relating to the delivery by him of a truckload of eggs to the Presidio. Upon inspection at the Presidio the eggs were rejected by Colonel Deane, the Army inspector. Upon informing Goddard on the telephone of this fact, Andrade was instructed to take the load of eggs and drive outside of the Presidio post exchange, shift the load, and wait until ten or fifteen minutes before 11:30, and then take the same load back to the Presidio, because at that time there would be only a sergeant on duty for inspection, the sergeant's lunch hour was 11:30, and he would be in a hurry and would probably pass the same load. Andrade followed these instructions, and upon his returning to the Presidio close to 11:30 everything happened as Goddard had anticipated and the eggs were accepted (R. 3245-3247).

A similar occurrence was related which involved a truckload of eggs which was rejected by Colonel Kielsmeier at the Presidio. Upon calling the office Mon-

charsh answered the telephone, and he instructed Andrade to bring the eggs back to the warehouse where another inspection would be made by Colonel Kielsmeier. Upon arriving back at the plant the load was shifted on the truck and two new sample cases were arranged on the load for Colonel Kielsmeier's inspection. The result was that upon this second inspection the same load of eggs, with the exception of the two sample cases, was taken back to the Presidio. This whole transaction was supervised by the defendant Moncharsh personally (R. 3247-3251).

The foregoing is rather a superficial account of Andrade's testimony, which contains other details which demonstrate the fraudulent practices which mark the character of deceit involved in the company's business with the Government.

In appellants' brief (Br. 37-43) the testimony of Andrade is criticized as incoherent, rambling, and chaotic and as evidencing such bias and prejudice that it should be disregarded. As a matter of fact, the appearance and demeanor of this witness on the stand were such that it was completely convincing to the jury, and there was every appearance that the witness was doing his best to give a true recital of events occurring five or six years previous to the time of his testifying. His memory of past events was no less than remarkable, and his failure to fix exact dates emphasized the truthfulness of his story. The jury's verdict is unquestionable evidence of their belief in his integrity.

The Testimony of Josephine I. Briant

Mrs. Briant was employed by Nye & Nissen from 1930 to 1942, principally at the Petaluma plant. She worked at the San Francisco plant for a period of three months beginning early in September of 1940 until early in December of the same year. Her employment was that of a candler (R. 2177, 2178). She testified that on the first day when she arrived at the San Francisco plant she was ordered by Menges or Nix to select by candling about 20 cases of eggs for an Army order, being assisted by two other candlers. The eggs to be selected were U. S. Specials, the Army equivalent at that time of Consumer A eggs (R. 3181). After the three candlers had candled enough eggs to make the necessary number of cases of U. S. Specials, in the afternoon of the same day, an Army lieutenant came with a driver to assist him and inspected these eggs, approximately 20 cases. After making the inspection and examination by candling two or three cases, he then applied the Army stamp not only to these two or three cases but to the balance of the order. Shortly after the lieutenant and his driver left, the witness and the two other girl candlers were directed to transfer the eggs out of these stamped cases and to substitute inferior eggs in their place, the result being that the cases bearing the official stamp of the Army then contained inferior eggs, including a considerable number of rotten eggs, this all being done under the specific instruction of their superiors at the plant, either Menges or Nix (R. 3182-3188). In cross-examination the witness brought out that in do-

ing the candling it was necessary to powder the eggs because they were storage eggs, this being done to conceal the appearance of storage eggs so that they would have the appearance of fresh eggs. This powdering was also done under the specific direction of her superiors (R. 3195, 3196, 3211-3217). Thus, two separate kinds of fraud were established by this witness, and the testimony of both Pineda and Andrade was clearly corroborated in proof of the conspiracy alleged in the first count of the indictment and as overt acts in furtherance of that conspiracy.

The Testimony of Marie Valdez

This witness was an egg candler for Nye & Nissen from 1941 to 1943 and worked under the instructions of Menges. The company moved from the old plant on Townsend Street to the new plant on Missouri Street about September or October of 1942. During the few months previous to moving from the old plant the witness received instructions from Menges to transfer eggs out of Government-stamped cases and put in their place eggs that had not been inspected—eggs of a different quality—without removing the Government stamp. When asked whether during the period of time immediately following removal to the new plant she had received instructions from Menges to transfer eggs from Government-stamped cases in the same manner, she replied: “Well, I can’t be sure of any special time but I know we did it many times” (R. 4289-4292).

On cross-examination the witness repeated the same statement more emphatically, saying that this transfer

of eggs occurred "many times a day for years like another day's work" (R. 4293, 4295, 4297).

This testimony demonstrates the same pattern of fraud which runs through the testimony of many other witnesses.

This testimony was followed by that of three other similar witnesses, all of whom were candlers in the employ of Nye & Nissen and all of whom testified to the practice, under Menges' orders, of transferring eggs out of Government-stamped cases and replacing them with other eggs. These witnesses were *Mrs. Eleanor McKenna* (R. 4300-4308), *Juanita Matheson* (R. 4308-4314), and *Violet Higuera* (R. 4315-4319), and in each instance the cross-examination strengthened and emphasized the improper and fraudulent practice referred to.

The testimony of these four girl candlers was offered and received in the Government's rebuttal to impeach the prior testimony of the defendant Menges, whom the jury acquitted. Nevertheless, their testimony corroborated Pineda and substantiated his account of a pattern of procedure which was followed with the knowledge and approval of all the other defendants including that of Moncharsh, the president of the corporation, and, though coming into the case for a limited purpose, became applicable to all the defendants at least insofar as it served to impeach Menges in all of his testimony favorable to all the defendants.

**The Testimony of FBI Special Agents E. Hewitt Magee and
Dallas A. Johnson**

These special agents of the Federal Bureau of Investigation were in charge of the investigation of this case. Their activities in company with Army officers in the examination and inspection of food products on the several ships where such products were delivered by Nye & Nissen and its officers and employees, are given hereafter in connection with the details of evidence touching these ships and relating primarily to the substantive counts of the indictment.

In this connection, however, there are certain general facts touching the character of the investigation which appear from their testimony. Their primary purpose during the brief period in April and May of 1944 when they visited the ships at the waterfront was to check and examine the eggs delivered by Nye & Nissen (R. 2941). During the first of these visits they did not weigh the cheese included in the deliveries because they had no reason to believe that the defendants were short-weighting it. This they discovered later, and the weighing of cheese then became routine (R. 2918, 2931, 2941). For like reasons they did not at any time weigh the butter because, at that time, they had no knowledge or information that butter was being cut short in weight. However, they "did look at the butter to see whether they had 50 prints in a box of 60, because we had received some complaint in some cases they were putting 50 prints in a box and charging for 60, but we didn't take the prints out and weigh them individually" (R. 2966).

It is further pointed out in Agent Magee's testimony why and when contact was made with the truck driver Nystrom. This first contact was on April 21 or 22, 1944, shortly before the first ship was visited (R. 2857, 2859). The reasons, the purpose, the necessity, and the duration of these contacts were brought out in the cross-examination of the witness by defendants' counsel. Thus the following appears on page 2938 of the record:

Q. You mean it was indispensable to your investigation that you form a contact with the driver of Nye & Nissen?

A. It was considered so at that time. We didn't wish to contact dozens of people to find out when the deliveries would be made, because we knew if any of those dozens of people should happen to call up the officials of Nye & Nissen Company they would immediately change their policies. We wanted to find what the policies were, so we could check on the deliveries.

Q. At the time you were down there checking certain ships you had already gone to that firm of Nye & Nissen and interrogated employees in that firm, had you not?

A. Had I?

Q. Your department?

A. Possibly so.

Q. There wasn't any question in your mind, was there, that in the months of March, April, and May 1944, that the firm of Nye & Nissen knew that their shipments to the waterfront were being investigated by your department, was there?

A. I am quite sure they did not know it.

Q. You are quite sure they did not know it?

A. From all indications they did not.

And again, at page 2981:

They knew we were checking the ships, as a matter of fact, after we had done a number of them. That is one reason we stopped because from that time on their deliveries were satisfactory.

At this point, however, we call particular attention to the testimony of these witnesses in rebuttal where the credibility of the defendant Moncharsh is impeached but also where proof is established of his complete dictation of the policies and of the day-to-day operations of the business of his corporation.

The foundation for his impeachment was laid in the cross-examination of Moncharsh at pages 4127 and 4128 of the record as follows:

Q. Do you remember an interview that you had on the first of September 1944, with the two FBI agents, Mr. Magee and Mr. Johnson?

A. I recollect that they were in to see me.

Q. And you had quite a long conference with them at that time, did you not?

A. No.

Q. And that was here in your office on Missouri and 17th Street, wasn't it?

A. That is right.

Q. At that time didn't you say to these two FBI agents that you personally were familiar with the type and quality of all eggs sold and delivered out of Nye & Nissen's plant in San Francisco?

A. I did not.

Q. And did you not say to them at that time that you knew and were familiar with the grades of all eggs sold to the Government from that plant?

A. I did not.

Q. Did you not also at that time say to them that you personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices of your products?

A. I could not.

Q. And did you not at that same time say to these FBI agents that you knew the quality of eggs on the floor of Nye & Nissen at San Francisco at all times?

A. I could never make such a statement.

Q. You could never make such statements, and you did not make those statements at the time and place indicated; is that right?

A. No. I may say a certain lot of eggs in the morning may be graded AA and in the afternoon they may be graded A.

Q. I am asking you if you made those statements to those FBI agents at the time and place mentioned?

A. I could never make any such statement.

Q. You did not?

A. No.

Mr. Magee and Mr. Johnson both testified that Moncharsh did in fact make these identical statements, the former at pages 4339 and 4340 of the record, and the latter at pages 4346 and 4347.

This testimony should, perhaps, be coupled with the stipulation made early in the trial wherein the de-

endants admitted the corporate organization of Nye & Nissen, and the character of its business and that, at all times mentioned in the indictment, the defendant Moncharsh was president of that corporation (R. 353, 354). This, with the proof of Moncharsh's participation in the fraudulent practices described in the first count, seems amply sufficient to justify the finding of guilt as to the corporation defendant.

Impeachment of Moncharsh in the S. S. Bates letters

In appellants' brief under Point V (Br. 113-120), it is complained that the Court erred to the prejudice of the substantial rights of the appellants in admitting, over objection, exhibits 179 to 183, inclusive. In the Government's brief, beginning at page 113, we have answered the appellants' arguments. It seems proper, however, in connection with the statement of the evidence in the case, to direct the Court's attention to the concluding cross-examination of the defendant Moncharsh on pages 4153 to 4171 of the record which includes the episodes relating to these exhibits. This matter also appears in full in the appendix to appellants' brief on pages 28 to 44.

We suggest the reading of this cross-examination because it presents a clear-cut impeachment of the veracity of the defendant. A large part of his testimony on direct examination consists of categorical denials of the testimony of Government witnesses, and the impeachment of his integrity thus gains added significance.

Proof of Overt Acts

Overt Act A, as alleged in the indictment, reads as follows (R. 8):

A. On or about the 1st day of February 1942, at the San Francisco plant of defendant Nye and Nissen, a corporation, defendants Ruby Jutland Goddard and Edward LeRoy Menges and coconspirator James Roosevelt Nix cut one-pound prints of butter, which were being inspected and graded by officials of the War Department, less than one pound and submitted sample prints of butter actually weighing one pound to said officials for inspection and weighing.

The proof of this overt act is made by Pineda in his testimony as set forth at pages 19–20 in this brief, *supra* (R. 903–915). It is therefore unnecessary to repeat it at this point.

Overt Act B, as alleged in the indictment, reads as follows (R. 8, 9):

B. On or about the 1st day of June 1940, at the San Francisco plant of defendant Nye and Nissen, a corporation, defendants Ruby Jutland Goddard and Edward LeRoy Menges and coconspirator James Roosevelt Nix placed a stamp purporting to be a grading stamp of the United States Department of Agriculture on cases of eggs which had not been graded by United States Department of Agriculture graders or inspectors.

The witness Pineda testified to the occurrences described in this overt act, but instead of placing them “on or about the first day of June 1940” it is indi-

cated that they occurred about two years previous to that date, that is, about the middle of the year 1938. That date is more than three years previous to the enactment of the act of Congress of August 24, 1942, which suspended the statute of limitations in cases involving fraud upon the United States until three years after the termination of hostilities in the War (U. S. C., Title 18., § 590a). This section does not apply to acts which were already barred by the provisions of law existing at the time of the passage of the act. While the acts described are not available as having been committed in furtherance of the conspiracy, they are, nevertheless, available in connection with the other testimony of Pineda to prove the conspiracy itself, but on account of the lapse of time the Government must abandon overt act B as an overt act.

Overt Act C, as alleged in the indictment, reads as follows (R. 9):

C. On or about the 1st day of February 1942, at the San Francisco plant of defendant Nye and Nissen, a corporation, defendants Abraham Moncharsh, Ruby Jutland Goddard, and Edward LeRoy Menges, and coconspirator James Roosevelt Nix, switched eggs from cases of eggs which had previously been inspected and graded by officials of the United States Department of Agriculture and War Department and inserted in their place eggs of an inferior quality.

This overt act is definitely proved by the testimony of Pineda as summarized on page 19 of this brief

(R. 891-895). The occurrences are described by him as taking place in November of 1941, which is within such a reasonably short time before the date of February 1, 1942, as to come within the definition of "on or about." Having directed the Court's attention to the testimony of Pineda in this connection, it seems unnecessary to repeat it here.

Overt Act D, as alleged in the indictment, reads as follows (R. 9):

D. On or about the 10th day of May 1944, defendant Ruby Jutland Goddard caused forty-five cases of eggs to be sold to the United States of America—War Shipping Administration, Matson Navigation Co., General Agent, and to be delivered to the Steamship *Cape Breton* at Pier 30 in the City and County of San Francisco, State of California, which eggs were of a lesser grade, weight, and price than that represented to said purchaser.

The evidence to establish this overt act is contained in the account of the delivery of 45 cases of eggs and other products by the defendant Nye & Nissen under the direction of the defendant Goddard on May 10, 1944, to the S. S. *Cape Breton* at Pier 30, San Francisco. The details of this transaction are described along with deliveries to other ships at pages 69-72 of this brief, post.

Overt Act E, as alleged in the indictment, reads as follows (R. 9, 10):

E. On or about the 10th day of May 1944, defendant Henry Eugene Berman, at the San

Francisco plant of defendant Nye and Nissen, a corporation, scraped the stamped weights off of four cases of California loaf cheese and caused said cheese to be sold to the United States of America—War Shipping Administration, Moore-McCormack Steamship Co., General Agent, and to be delivered to the Steamship *Cape Cumberland* at Berth 6, Outer Harbor, City of Oakland, State of California, and caused said purchaser to be charged for more pounds of cheese than were actually delivered.

The evidence in proof of this overt act also appears in connection with the description of deliveries to ships, in this case to the S. S. *Cape Cumberland*, and the details appear at pages 72–74 of this brief, post.

The S. S. “William S. Clark” Incident

The evidence relating to the delivery of 45 cases of eggs to the S. S. *William S. Clark* on October 18, 1943, is discussed in appellants’ brief on pages 46 to 49. They refer to it as an isolated incident and make a labored effort to discredit the evidence and to excuse the connection of Moncharsh with a palpable fraud which obviously was completely in furtherance of the conspiracy described in the indictment and proved by the evidence. The facts are these:

On January 29, 1943, Nye & Nissen received at their Los Angeles branch 105 cases of eggs which had been shipped to it from Minnesota. These eggs were thereupon placed in cold storage at the plant of the Terminal Refrigerating Company of Los Angeles for

the account of Nye & Nissen on February 10, 1943. They were given lot number 3737 and each case was stenciled or stamped with that number. In storing eggs it is customary to have them "processed," that is, treated with a coating of mineral oil to prevent or delay deterioration. These 105 cases of eggs, however, were "natural" eggs, that is, they were not so treated. Upon the receipt of these eggs for storage the Terminal Refrigerating Company issued its warehouse receipts to Nye & Nissen, and thereafter the eggs were subject to the orders of that company. (R. 2073-2084.)

On October 15, 1943, an order was received by the warehouse company from Nye & Nissen to ship these 105 cases to Nye & Nissen in San Francisco, and a bill of lading was thereupon issued to the California Freight Lines describing the shipment as 105 cases lot 3737 for shipment to San Francisco, and the shipment actually left Los Angeles on October 16, arriving in San Francisco the next day. (R. 2084-2085; Ex. 124, 125, 126, 130.)

On October 18, 1943, in pursuance of a purchase order issued by the American President Lines in behalf of the War Shipping Administration, 45 cases of these eggs, all bearing the lot number 3737, and therefore clearly identified as the eggs which had been in storage for over eight months, were delivered to the S. S. *William S. Clark*, and thereupon the invoice of Nye & Nissen was presented to the American President Lines as general agent for War Shipping Admin-

istration for 45 cases of medium processed AA eggs. This invoice (Ex. 112) is as follows:

INVOICE
 NYE AND NISSEN, INC.
 WHOLESALE DAIRY PRODUCE
 1301 17th Street, San Francisco, Calif.

U. S. A. W. S. A.

c/o American Pres. Lines

10-18-43

General Agents

City

45 cases eggs, mediums, AA, proc., 1,350 at .58-----	783. 00
20 boxes butter, 60# ea. AA, unsalted, 1,200 at .47¼-----	567. 00
	<hr/> 1, 350. 00

H-8464

Str. William F. Clark

Pier #42

The S. S. *William S. Clark* was a new ship which had just been delivered to the Government and assigned to the management of American President Lines, and upon the stores being delivered to the steamship it started on a voyage to the Southwest Pacific, stopping in Australia, and then through the Suez Canal, the Mediterranean and the Atlantic, finally completing its voyage at Baltimore, Maryland, where it arrived in April 1944, a period of approximately six months. Fortunately, before proceeding on its voyage overseas, the vessel proceeded first to San Pedro and Long Beach, California, from which latter point it finally left on November 4, 1943. The chief cook on this vessel was a Negro by the name of Haffel H. Brown, and in his testimony he gave a picturesque description of the eggs in question. His testimony in that connection is quoted from pages 1722 and 1723 of the record:

MR. PRATT:

Q. What did you observe about these eggs, Mr. Brown?

A. To be frank with you, the eggs, I will say this is my crew, I am just illustrating about these eggs. You order your eggs this way, that way, and the other way. I got five or six bowls there that I crack the eggs into before I take them over to the stove, to the frying pan, to see whether they are good, or not. I had a lot of trouble with them for the simple reason, why, a lot of them was very, very, very bad.

Q. In what respect were they very, very bad?

A. Rotten. To be frank with you, rotten.

Q. How about the odor from these eggs?

A. Some of them would run you out of there if you were in there, the way you could have smelled them.

Q. How long did that continue?

A. That continued until we got into Long Beach, Pedro, rather.

Q. How long a period of time was that from the time you first started to use these eggs until you got down to San Pedro, or Long Beach?

A. We got down there the latter part of October, because we left on November 4th.

Q. During that period of time how many of these cases of eggs did you open and examine?

A. Well, there was quite a few of them opened to try to get some good ones out of the bunch.

Q. Were you able to use some of the eggs that were in these cases?

A. Some I could use and some I couldn't, and they got so bad I just give up the sponge, told them I was going to get off.

On arrival at Long Beach complaint was made by one of the ship's officers to the American President Lines, and Mr. A. E. Fiske, its purchasing agent, called the defendant Moncharsh on the telephone and told him of the condition of the eggs and also of the butter which was part of the order, and requested that they be removed from the ship and other eggs and butter substituted. Moncharsh then notified the Los Angeles manager for Nye & Nissen, Frank Gartenberg, and the latter in company with Mr. A. G. Abell, an inspector of the United States Department of Agriculture, went aboard the ship at Long Beach and examined the eggs by candling. It was discovered by this examination that the inedible eggs were as much as two to every four to eight eggs examined, due to the presence of mold spots, mixed rots, or black rots. It further appeared from this examination that the eggs were plain or natural eggs and had not been "processed." (R. 2087-2099; 2027-2036.)

These eggs were further examined on the ship by candling by Mr. C. A. Wirth, Egg Standardization Supervisor for the California Department of Agriculture, Mr. H. W. Bradway, an inspector of the Agricultural Commissioner of Los Angeles County, and Mr. G. Wallace Rynerson, inspector of the United States Food and Drug Administration, on November 3, 1943. These experts worked together in the examination of the eggs. They opened 10 crates and examined half the eggs in each. Mr. Wirth testified that he personally examined 6 cases of eggs by candling 15 dozen in each case. He found no grade AA or grade A eggs, and his computation showed that

8.6% were inedible, 21% were grade B, and 69.5% were grade C. However, on account of the presence of inedible eggs the whole lot was entitled to no grade whatever. Mr. Bradway testified that all the cases of eggs on the ship, there being then 40 cases unopened and 1 case which had been broken, bore the stamped number 3737 with the name Nye & Nissen and the word "Medium" also stamped on the cases, but none bore any Government stamp. He also corroborated Mr. Wirth's testimony in regard to the condition of the eggs and further that they were plain, that is, natural eggs and not "processed." Mr. Rynerson also completely corroborated his two associates in regard to the examination of the eggs on the ship, and he further testified that on the following day he went to the premises of Nye & Nissen in Los Angeles and again examined 10 half crates of eggs, with the same results, namely, finding of numerous mixed rots, spot rots, black rots, moldy eggs, with the highest percentage of grade C eggs and with no grade AA or grade A. These witnesses were all experts and highly experienced from many years of inspection of eggs by candling. These witnesses all examined the condition of the chill box and found it satisfactory for the storage of eggs. (R. 1848-1859; 2010-2013; 1962-1974.)

After the foregoing examination, the witness Wirth, in his official capacity as an officer of the State of California, ordered the 40 full and 1 broken cases removed from the ship and waited while they were loaded onto a truck of the California Freight Lines. He then issued a formal notice to the driver of the

truck that the eggs were in violation of the Agricultural Code of California and directed that the truck be driven to the yard of California Freight Lines in Los Angeles. The following morning, November 4, 1943, Mr. Wirth went to that yard and instructed the freight office to contact Nye & Nissen's office to find out what they wanted done with the eggs. He stated that all the 41 cases were wooden cases, that all had the number 3737 stamped on them. Later, after a conference with Frank Gartenberg, local manager for Nye & Nissen, he issued a violation notice to Nye & Nissen and gave instructions that the eggs should be reconditioned within 24 hours. By reconditioning is meant recandling and regrading. This was done, and as a result 146½ dozen inedibles, namely, 1,758 eggs, were loaded onto a truck and taken to an incinerator. The balance of the eggs, being edible, were then released to Nye & Nissen. Witness further testified that from his examination he could tell the approximate age of these eggs, and he stated that they were approximately six to seven months old. After these eggs were removed from the ship they were replaced by Nye & Nissen with 40 cases of eggs which were then placed in the chill box and, according to the testimony of Haffel Brown, the cook, they were still being used when the ship landed at Baltimore six months later. This fact gives ample proof that the chill box in which the eggs were stored was in proper condition for the storage of eggs. (R. 1860-1861.)

Included with the objectionable shipment of eggs were 20 boxes of butter. The witness Haffel Brown

testified that the butter was rancid, and the witness Fiske, the purchasing agent for the American President Lines, testified to the same effect. The force and effect of this incident, however, relates principally to the fraudulent delivery and invoicing of the eggs.

A second feature of this incident relates to a report made by Frank Gartenberg, Los Angeles manager for Nye & Nissen, to the defendant Moncharsh. This consisted of a memorandum which was received in evidence in connection with Gartenberg's testimony as exhibit 137 and appears on pages 2101 and 2102 of the record and is as follows:

Memorandum, Nye & Nissen, Inc., November 3, 1943

To A. Moncharsh from Frank.

DEAR ABE: I spent all morning at the harbor checking on the eggs and butter delivered to the *W. S. Clark* at San Francisco. I found the butter a bit rancid and some of it was O. K., but the eggs, I have candled three half-cases and found them to be from one and a half to two and a half dozen loss to the half case, and the good eggs were nothing but standards and trades. These eggs are part of the 105 cases that were shipped to you on October 14, Lot 3737, stored at the Terminal. They had not been candled and they were in the original cases, and the lot numbers stamped right on the cases. The steward of the ship was very much excited about the kind of eggs he got and stated that he certainly was glad that he was detained at Long Beach Harbor, which will give him a chance to change the eggs and butter. He also stated to me that he saw the same butter and

eggs on another ship which had left the harbor yesterday morning and that they had the same trouble. They had to break out nine hundred eggs to get five hundred. He told me that he had called in the Army and Navy inspectors and also a civilian inspector in Long Beach, who was along with the veterinarian. He did not know whether he was a state man. And they have all told him that these eggs were under grade eggs and had considerable loss in them and were not fit for them to go to sea.

Abe, you certainly should check in on this and see whose error it was to ship that kind of merchandise on a seagoing vessel, as after all these boys who are going out on these boats are risking their lives for us at home, and we certainly should see that they get the right kind of food, especially when they are paying for it. The butter and eggs were both kept under refrigeration, under a temperature of 38. The engineer of the ship made his report to that effect, and the steward said that he is making out a full report to the company.

[Signed] FRANK

The evidence whereby this incident was presented to the jury shows conclusively the connection of the defendant Moncharsh with the transaction involved. As the president and guiding head of the corporation, it was clearly within his functions to purchase large quantities of eggs as was done in this instance and to store such eggs for future handling and sale. His knowledge of the transaction was clearly demonstrated, and the whole episode reeks of deliberate and premeditated fraud and clearly and unequivocally was

a transaction completely in furtherance of the conspiracy described in the indictment.

The S. S. "Hawaiian Shipper" Incident

This incident and the evidence to prove it gave a telling demonstration of the pattern of fraud which permeated every transaction which, in the circumstances, was susceptible of proof. During the war period when ships were supplied with stores for a voyage lasting many months, specific instances of fraud rarely became provable from the very fact of the lapse of time and the consumption or destruction of the stores during the course of the voyage. But in the case of the S. S. *Hawaiian Shipper* there was a notable exception, and complete proof of fraud became available.

The S. S. *Hawaiian Shipper* was a troop carrier and carried 1,900 troops and a civilian crew of 86 besides a Navy gun crew of 43, a total of over 2,000 (R. 1498). It was managed for WSA by Matson Navigation Company, and for the ship's 13th voyage the Matson buyer issued a purchase order for delivery on December 5, 1944, of "400 cases of eggs, Fresh, Processed, Large, White, Procurement No. 1 or Consumer Grade A to specifications of WSA Food Control Regulation No. 14 (Ex. 74; R. 1342). The ship arrived at San Francisco from voyage 12 on November 29, 1944, and left on voyage 13 on December 16. A few cases of eggs remained in the ship's chill box at the end of voyage 12, and 10 cases were taken on as port stores before the 400 cases in question came on, and when voyage 13 started there were

4 or 5 cases left of the port stores. All of these eggs were purchased from Nye & Nissen (R. 1506-1507), and all were stored in the ship's large chill box which was kept between 34 and 36 degrees, the temperature being checked every hour during the voyage by the "reefer," the refrigerator inspector (R. 1509).

Within a day or two after the start of the 13th voyage the eggs remaining from the port stores were consumed and those provided for the voyage came into use. Then it was that discovery was made that the eggs were far below the grade ordered and for which the defendants had invoiced them. Specifically, it was testified by the ship's chief steward, Debes, the chief cook, Dolyn, and the chief baker, Oscarsson, that these eggs, in large part, were inedible, that is, were rotten and with a vile odor, and those that could be classed as edible had to be cooked with mace and nutmeg to cover up and conceal the odor and taste (R. 1596). Dolyn, the chief cook, testified that of every dozen of eggs he had to throw at least four and sometimes six or more into the garbage can, and this happened day after day (R. 1597, 1598).

The experience of Oscarsson, the chief baker, is expressed by him at pages 1547, 1548, and 1549 of the record as follows:

MR. PRATT:

Q. Immediately after the voyage started, I will ask you if you found in breaking eggs that there was anything the matter with them?

A. Yes. I think it was two days after we left.

Q. What did you discover?

A. Oh, there was so many rotten eggs I couldn't use them.

Q. When the cases of eggs came to you, how many came at a time?

A. One case.

Q. One case. On the occasion you are speaking of, two or three days after the voyage started, tell just what you did when that case of eggs came to your bakeshop?

A. I got a case of eggs——

Mr. FAULKNER. The same objection to this as made to Mr. Debes' testimony, on the same subject.

The COURT. Overruled.

Mr. FAULKNER. Exception.

The COURT. You may answer. What happened on that day?

Mr. PRATT:

Q. What happened?

A. I got a case of eggs up.

The COURT. Who got it up? You?

A. No, my helper.

Q. What time of day was this about?

A. It was nine o'clock in the morning.

Q. This was on the second or third day after you got out?

A. I think it was the second day out.

Q. All right. Tell this Jury what occurred at that time and place.

A. I opened that case. He couldn't break some eggs because he was busy carrying up stores, and I started to break a couple of eggs, and three or four were rotten right away. So I tried a few more again, and they wasn't so good. So finally we had some small regular

soup bowls, like they have on shore here for soup, so I got some of them, three or four, and I started to break one at a time. When we break them, it is too much trouble to do that, but I had to do it, so I started to break one or two eggs.

Mr. PRATT.

Q. Previously had you broken a lot of them in one bowl?

A. Yes.

Q. And what happened then when you did that on that occasion?

A. Well, I got too many rotten—the first egg I broke was rotten, see? And then I broke another one. Not so good. And then I broke another one. It was rotten. And then I had to get those bowls. And then I called the chief steward down, Mr. Debes.

Q. And you showed him the eggs?

A. I told him why——

Q. Never mind what you told him, Mr. Oscarsson. What did you do?

A. I say look at——

Q. What did you do and what did he do?

A. He looked at them and we broke some more. I think while he was there we broke about a dozen. He said, “I don’t know what to do. You try to do the best of it.”

Q. What did you do then?

A. I had to keep breaking them individual, one at a time, and I get—in some layer I didn’t get more than three or four out of a layer, and out of some layers I get as high as ten.

Q. How many are in a layer?

A. There is three dozen in a layer.

In addition to the bad condition of the eggs as expressed by these witnesses, it further appeared that the cases were not full, that is, there were eggs missing from the layers and in many instances whole layers, each supposedly of three dozen, contained no eggs at all. (Oscarsson, R. 1552-1554; Dolyn, R. 1593; Debes, R. 1521, 1522.)

The foregoing account of the condition of these eggs together with the fact of the shortage above-mentioned should be contrasted with the invoice of the defendants, exhibit 87, which is as follows:

INVOICE

NYE AND NISSEN, INC.

WHOLESALE DAIRY PRODUCE

c/o Bank of America, California & Montgomery

San Francisco, 10, Calif.

U. S. A. W. S. A.

Matson Navigation Co.

12-5-44

General Agents

City

400 cs. eggs, large, proc. procurement #1 12,000 @ .595----- 7, 140. 00
#89042

S. S. Hawaiian Shipper

Pier 32

Inspected by W. F. A.

" " U. S. V. C.

This incident is discussed in appellant's brief on pages 57 and 58, and a labored effort is made, with some misstatement of the evidence and its effect, to minimize its probative force. They seek to intimate that the eggs in question were on the Matson dock so long before being loaded that they had deteriorated from that fact, but the record fails entirely to bear out their assertions, as will be seen not only from the

testimony of the crew that loaded the supplies on the ship, the conditions on the covered dock, and the temperature on those days in December 1944, but the fact that the rottenness of the eggs was of a character that could not have developed in a few days even if conditions and weather had been adverse (Cooper, R. 2183; Stefani, R. 2190-2194; Norquist, Weather Bureau official, R. 3155; Dolyn, R. 1594).

Appellants also misrepresent the evidence. They speak of "missing layers of eggs in a few cases," whereas the testimony of Debes, Dolyn, and Oscarsson was to the effect that there were missing eggs throughout the entire shipment (R. 1522, 1552, 1594, 1595). Again, appellants say that "all the eggs were used during the voyage and one case of them was sold off ship while at Leyte." This is inaccurate. Not only were large quantities of these eggs consigned to the garbage and thrown overboard but, because of this, it became necessary to take on additional eggs at Leyte from another ship, and it was one of these cases that was sold to an officers' club at Leyte (R. 1535, 1541).

This whole incident, as completely demonstrated by the evidence, disclosed a deliberate and premeditated fraud on the Government, directly in furtherance of the conspiracy alleged in the first count of the indictment.

THE SUBSTANTIVE COUNTS 2 TO 7 AND THE EVIDENCE OF FRAUDULENT INVOICES

On pages 8 and 9 of appellants' brief there is a sufficient synopsis of the substantive counts 2 to 7 of the indictment.

In proving these counts the Government brought as witnesses the officers of the several steamship companies which, as agents for WSA, operated the vessels to which deliveries of eggs, cheese, and butter were made by the defendants. These officers produced the original purchase orders issued to Nye & Nissen and also the original invoices issued by Nye & Nissen, claiming payment from WSA for the purchase price of the products. They also proved by proper documents that all these invoices were paid with Government funds.

It is the falsity of these several invoices that is the basis of the charge in each of these counts that the defendants presented a false claim against the Government in violation of Section 80, Title 28, U. S. C. These offenses were all committed during the months of April and May 1944, and the evidence of the defendants' fraudulent conduct was secured by actual examination and inspection of eggs (and in a few instances of cheese) at the time of or immediately after delivery to the ships. This was accomplished by agents of the Federal Bureau of Investigation with the assistance of Army experts and without the knowledge of the defendants.

The procedure of the investigating officers was this: They secured the cooperation of Nystrom, a truck driver for Nye & Nissen who informed the FBI when he was about to make a delivery to the waterfront.⁵

⁵ Delivery to the S. S. *Cape Breton* was made by truck driver Ranson; the evidence does not disclose who made delivery to the S. S. *James Oliver*, which was after Nystrom had left the employ of Nye & Nissen.

Thereupon one of both of the FBI agents Magee and Johnson went at once to the ship where delivery was made and took with them an officer of the Army Veterinary Corps who was skilled in the inspection of eggs by candling. These officers were Major Milton R. Evans and Lieutenant Colonel Pearl H. Hand. At the ship in each instance they secured from the ship's steward his copy of the Nye & Nissen invoice which accompanied delivery of the products, and thereupon the Army officer examined the eggs by candling sufficient samples to determine the grade and size of the whole lot. Also, in some instances, the cheese was weighed. In every instance it was determined by these expert methods that the eggs were far below the grade or size of the eggs described in the invoices, in some instances were so deficient as to be of no grade and therefore unsalable under WSA regulations, and in all instances were of much less value than the prices named in the invoices. Thus was disclosed a course of fraudulent conduct which not only established the defendants' guilt of the offenses charged in counts 2 to 7 but which was in furtherance of the conspiracy and, further, these transactions constituted overt acts in the consummation of the purposes of the conspiracy.

Besides the six ships mentioned in counts 2 to 7, the evidence gives the details of visits by these FBI agents and the Army inspectors to nine other ships where they made the same kind of investigations. The results on these ships were the same, namely, clear evidence of the inferior quality of products delivered

by Nye & Nissen and the issue in each instance of a false invoice by the defendants. These were offered and received in evidence as similar transactions in establishing the fraudulent purpose and intent of the defendants and also as additional overt acts committed by them in furtherance of the conspiracy.

Oscar Nystrom was employed as a truck driver by Nye & Nissen from January 1944 until about May 15 of the same year. In the morning of every day he made deliveries to two stores in San Francisco maintained by Nye & Nissen, following which he made two or three deliveries a day of eggs, butter, and cheese to ships at the waterfront. His instructions all came usually from the defendant Berman, but at times from the defendant Goddard, who told him what articles to load on his truck and where to deliver them and gave him invoices which accompanied the deliveries (R. 2450-2452).

Beginning with the delivery of eggs to the S. S. John Muir on April 24, 1944, he notified FBI agents Magee or Johnson at the time of all deliveries to WSA ships and made a note of the exact time of the deliveries and the names of the ships (R. 2494). His first contact with the FBI, as testified by Agent Magee, was on April 21 or 22, 1944 (R. 2857).

As briefly as possible, the evidence establishing these transactions was as follows, giving first, in their order, those involving the substantive counts, 2 to 7, then the two which prove two of the overt acts alleged in count 1, following which are the details relating to other ships:

S. S. "Cape Charles" (count 2)

The evidence relating to this ship gives complete proof of the second count of the indictment. This includes, as in each of the substantive counts, proof of the general agency operating contract between the WSA and the steamship company to which the ship was assigned and all the other formal allegations contained in paragraphs 2 to 5 of each of these counts. The sufficiency of this proof is not questioned and the details are therefore omitted.

The false invoice in this case upon which the violation of Section 80, Title 18, U. S. C., is predicated is exhibit 94. This invoice is dated April 29, 1944, is addressed to "USA, WSA, Agwilines, Inter-ocean S. S. Co., General Agents," in the sum of \$789.18, for the delivery of three cases of Cheddar cheese, 240 pounds at \$0.287 per pound, \$68.88; and 36 cases of eggs, medium processed AA, 1,080 dozen at \$0.41 per dozen, \$442.80; to be delivered, pursuant to Agwilines, Inc. purchase order No. CHAR-60, to the S. S. *Cape Charles* at Pier 18.

Nystrom loaded his truck for this shipment on April 29, 1944, under the supervision of Berman, who gave him several copies of the invoice which, with the truckload of products were delivered to the ship at Pier 18, San Francisco. On his return to the plant he handed Berman the receipt showing the delivery. At the time of this delivery he notified the FBI agents of that fact (R. 2494-2503), and on the same day Agents Magee and Johnson, accompanied by Major Evans, went aboard the ship. They

found the 36 cases of eggs still on the deck and the cheese and butter in the dairy box under refrigeration. Agent Johnson weighed the cheese and found it had a net weight of 149 pounds, which was 91 pounds short of the invoiced weight of 240 pounds (R. 2995).

Of the 36 cases of eggs, 32 bore the USDA inspection stamp and 4 cases bore no stamp. Samples of the eggs were candled by Major Evans in a dark room arranged in a shelter on deck. In this examination he candled and weighed 3 unstamped cases and 1 stamped case and weighed an additional stamped case. The result was as follows:

Case 1: Unstamped; contained 41% Grade AA, 35% A, 16% B, 2% C, 2% Small Blood Spots, 3% Checks, 1% Inedible. Owing to the inedible eggs the case could be given no grade, but eliminating consideration of the latter, the eggs graded Grade B. Witness weighed the eggs in case 1 and found the net weight was 34 pounds 14 ounces, which brought them barely within the classification of U. S. Small, being 5 pounds and 2 ounces short of the weight required for U. S. Medium.

Case 2: Unstamped; contained 14% Grade AA, 36% A, 35% B, 12% C, and 3% Inedible. This gave them no grade on account of the inedible eggs; otherwise they would grade U. S. Consumer Grade B. Net weight was 33 pounds 4 ounces, which classified them as peewees.

Case 3: Unstamped; contained 44% Grade AA, 33% A, 18% B, 3% C, and 2% Checks. This graded U. S. Consumer Grade B. The

net weight was 33 pounds 10 ounces, classifying them as peewees.

Case 4: Stamped; stamp dated April 27, 1944; contained 73% Grade AA, 21% A, 4% B, 1% Small Blood Spot, 1% Check. The eggs graded U. S. Consumer Grade A.

Case 5: Stamped; was not candled, but weighed 40 pounds and 4 ounces, which is Medium. (R. 2642-2658.)

From the foregoing it clearly appears that the invoice was false and fraudulent both in the weight of the cheese and the grade and size of the eggs. All the circumstances attending the delivery of inferior products in this and numerous other similar instances point inescapably to the deliberate fraudulent intent and purpose of the defendants in the use and presentation to WSA of the false invoice described in count 2.

S. S. "Mission San Diego" (count 3)

As stated in the synopsis of evidence relating to count 2, we are omitting statement of the evidence which established the formal allegations of the indictment as to count 3 and we are giving herewith only the evidence which clearly establishes the fraudulent character of the Nye & Nissen invoice upon which the violation of Section 80 is based. This false invoice is exhibit 153, is dated May 10, 1944, and is addressed to USA, WSA, Deconhil S. S. Co., General Agents, in the sum of \$307.07, for the delivery of 10 cases of eggs, medium processed AA, 300 dozen at \$0.41 per dozen, \$123.00; one case Romano Dolce cheese, 65 pounds at \$0.40 per pound, \$26.00; and one case of

Cheddar loaf cheese, 30 pounds at \$0.295 per pound, \$8.85; to be delivered pursuant to Deconhil Shipping Company purchase order No. 1124 S to the S. S. *Mission San Diego*, Oakland, California.

Nystrom testified that on the same date he prepared the above shipment for delivery under Berman's supervision and delivered it at the Amship Pier, Oakland, California. He identified the invoice as being one of a number which were given him by Berman to accompany the delivery to the ship. When he returned he delivered to Berman a receipt secured at the ship (R. 2521-2523).

The next day, May 11, 1944, FBI Agents Magee and Johnson, accompanied by Major Evans, visited the ship. There they saw a copy of the Nye & Nissen invoice and checked the products described therein, all of which were in the chill box. They found 10 cases of eggs which bore the Nye & Nissen label, none of which had the USDA inspection stamp on them, but all the labels bore the notation "Medium Grade A" appearing to be put on by a rubber stamp. Agent Magee weighed the cheese and found that the Romano Dolce cheese described in the invoice as 65 pounds weighed net 57 pounds and 13 ounces. The case of Cheddar loaf cheese invoiced at 30 pounds weighed 24 pounds and 7 ounces (R. 2886-2891).

Of the 10 cases of eggs, Major Evans examined, by candling and weighing, 2 cases, with the following result:

Case 1: Contained 60% Grade A, 18% B, 1% C, 11% U. S. Light Dirties, 3% U. S.

Dirtyes, 1% Checks. Net weight was 38 pounds 14 ounces. Grade of case was U. S. B Small.

Case 2: Contained 68% Grade A, 27% B, 4% C, 3% Light Dirtyes, 2% U. S. Dirtyes, 1% Inedible.

There were no AA eggs in either case. The whole lot of 10 cases was given a grade of B small, although on account of the inedible eggs it was entitled to no grade. The invoice described 10 cases of medium *processed* AA eggs, but Major Evans reported that the eggs were plain eggs and not processed (R. 2697-2700).

From the foregoing it plainly and emphatically appears that the invoice in this case was fraudulent, as alleged in the indictment, and taken in connection with the testimony of Pineda, Andrade, Nystrom, and the girl candlers, it is completely proved that this violation of law was committed by the defendants with deliberation and fraudulent intent.

S. S. "Francis W. Parker" (count 4)

Again the evidence relating to these transactions emphatically proves all the allegations of the fourth count of the indictment. The Nye & Nissen invoice (Ex. 102) is dated May 9, 1944, is addressed to USA, WSA, Alaska Packers Association, in the sum of \$996.87, for the delivery of 45 cases of eggs, medium processed AA, 1,350 dozen at \$0.41 per dozen, \$553.50; to be delivered, pursuant to Alaska Packers Association purchase order No. 2906, to the S. S. *Francis W. Parker* at Pier 41. Nystrom testified to delivering these eggs with certain butter and cheese to the S. S.

Francis W. Parker at Pier 41, San Francisco, on May 9, 1944. He identified the invoice exhibit 102 which with other copies of the same paper he received from Berman. He also identified exhibit 104, the delivery slip in Berman's handwriting which was signed by the steward of the ship and returned to Berman (R. 2518-2520).

Kemmerle, the chief steward on this ship, also identified the Nye & Nissen invoice and also the receipt exhibit 104 which bore his signature. He stated that within an hour after the eggs were delivered to the pier the Government officers arrived on the scene and he assisted in carrying five cases of the eggs to his cabin on the ship where they were candled by Major Evans (R. 1668-1674).

FBI Agent Johnson testified that he boarded this ship on May 9, 1944, in company with Major Evans and FBI Agent Ellis, at Pier 41. Of the 45 cases of eggs, 38 bore the inspection stamp of the USDA, the other 7 bearing no such stamp. The eggs were first seen on the pier and later were loaded on the ship. Mr. Johnson and Major Evans weighed 11 cases, 4 of which bore the stamp and 7 did not. The stamped cases all weighed slightly less than the 40-pound minimum for medium eggs. The unstamped cases varied in weight from 32 pounds 8 ounces (peewee) to 35 pounds 6 ounces (small) (R. 3021-3023).

Major Evans testified to his having candled four cases in the steward's cabin, all of which bore the USDA inspection stamp. Three of these cases graded A small and the other B small. On the basis of the

examination and weighing of the several cases, the whole shipment of eggs was determined to be U. S. Grade B Small (R. 2692-2697).

In connection with his testimony, FBI Agent Johnson identified and there were offered in evidence three eggs out of one of the unstamped cases. These were very small eggs and were produced by Mr. Johnson in a small carton. He stated that this carton had not been on the ship but it was used as a convenience in bringing the eggs into court. Defendants' counsel, Mr. Faulkner, at this point made a great to-do about this small carton because it bore the words "Large Grade A Eggs." He objected to the eggs, which were obviously small eggs, being brought into the presence of the jury in this carton and assigned it as misconduct, charging that Government counsel had deliberately picked a Nye & Nissen carton marked "Large Eggs" in bringing these small eggs so as to make some sort of impression on the jury (R. 3024). Mr. Pratt replied that there was no justification for any such remarks; that the Government was not bringing in the container for any purpose in the case; that the Government did not want to have anything in the case not absolutely proper and aboveboard, and represented the implication of defense counsel's remarks that the Government was deliberately doing something for the purpose of deceiving. Mr. Faulkner repeated his charge of misconduct. The Court thereupon directed the jury to disregard the remarks of counsel on both sides and stated (R. 3026) that the eggs were received in evidence and the carton was to be dispensed

with, with the assistance of the clerk. Mr. Pratt then called the Court's attention to the fact that the only indication of what appeared on this carton came from counsel for defendants reading what was on it, the jury not having had possession of it or an opportunity to see what was on it. The Court then repeated that the eggs would be admitted in evidence, and in a jocular tone suggested care in handling these eggs, which were then about two years old (R. 3025, 3026). It then appeared (R. 3028) that the three eggs, having been placed in another container, were exhibited to the jury. Thus this tempest in a teapot was at an end.

In appellants' brief under point IV B, this episode is alleged as misconduct and is argued beginning at the bottom of page 108 of their brief. This will be later referred to and answered in this brief.

S. S. "Gilbert Hitchcock" (count 5)

The allegations in the fifth count of the indictment are completely proved by the evidence.

The false invoice upon which the violation of Section 80 is based is exhibit 144. It is addressed to USA, WSA, Alaska Transportation Company, General Agents, is dated May 1, 1944, for the sum of \$1,478.42, for the delivery of 55 cases of eggs, medium processed AA, 1,650 dozen at \$0.41 per dozen, \$676.50; and 2 cases of Cheddar trips, 160 pounds at \$0.287 per pound, \$45.92; to be delivered, pursuant to Alaska Transportation Company purchase order No. H 8, to the S. S. *Gilbert Hitchcock*, Pier 23.

Nystrom received these products from Berman and Goddard, loaded them on his truck, and delivered them on May 1, 1944, to the above ship at Pier 23, San Francisco. (R. 2507-2509.) Shortly thereafter and while the products were still on the pier, FBI Agent Johnson and Major Evans arrived. After they were loaded on the ship Major Evans examined the eggs by candling and weighing, and Agent Johnson weighed the cheese. Of the 55 cases of eggs, 41 bore the USDA inspection stamp and 14 bore no stamp, although all bore the Nye & Nissen green label denoting medium weight eggs.

In weighing the cheese it was found that it weighed 12 pounds and 2 ounces short of the invoiced weight (R. 2994).

In examining the 14 unstamped cases of eggs two cards were found on the top layer of the eggs (Ex. 39 and 40). One of these cases bore the penciled notation "candled pullets" and the other the word "pullets." This comports with the testimony of Pineda who testified that such cards were customarily placed in cases of pullets or peewees by the girl candlers (R. 508-511).

Upon candling 100 eggs in each of 6 cases Major Evans reached the following conclusions:

Case 1: Not stamped; when top was removed from case a penciled card with the word "pullets" was found, admitted in evidence as exhibit 39. The eggs were not processed, and graded as follows: 6% Grade AA, 51% A, 35% B, 6% C, 2% Inedible; entitled to no grade because of the inedibles; otherwise would grade

U. S. Consumer Grade B. Net weight of case was 33 pounds 12 ounces, thus classified as peweese.

Case 2: No stamp; penciled on the lid was the word "pullets." The eggs were not processed. They graded as follows: 11% AA, 58% A, 27% B, 3% C, 1% Inedible Mixed Rot. No grade on account of the inedibles; otherwise would be grade B. Net weight 34 pounds 2 ounces; classified as small, being 5 pounds and 14 ounces short of medium.

Case 3: Stamped; 29% AA, 42% A, 24% B, 2% Checks, 1% Small Meat Spot, 2% Inedible Mixed Rots; no grade on account of inedibles; otherwise grade B. This case was all brown eggs, therefore difficult to candle.

Case 4: Stamped; 60% AA, 26% A, 12% B, 1% C, 1% Checks; case Grade A; weight 39 pounds and 12 ounces, being 4 ounces under minimum medium weight.

Case 5: No stamp; not processed; 36% AA, 36% A, 24% B, 1% Checks, 3% Inedible; no grade because of inedibles; otherwise grade B; net weight 33 pounds and 12 ounces; classified as peweese.

Case 6: Stamped; 65% AA, 20% A, 6% B, 3% C, 5% Checks, 1% Inedibles; no grade on account of inedibles; otherwise grade A; weight 38 pounds; classified as small. (R. 2660-2673; 2985-2994.)

The fraudulent character of the invoice in this case is too obvious to require further comment. By clear implication, it connects Moncharsh with the offense in that Pineda testified that the operations of the plant, including the candling of eggs, were under the con-

stant supervision of Moncharsh (R. 446, 460, 461, 466, 471), noting also that he stated unequivocally to Agents Magee and Johnson on September 1, 1944, that he knew and was familiar with all the types of eggs delivered out of the Nye & Nissen plant (R. 4339, 4340). This same observation applies to all shipments of eggs delivered to the several ships.

S. S. "Czechoslovakia Victory" (count 6)

The allegation in the sixth count that the defendants submitted a false invoice to the Government is clearly established. This invoice (Ex. 151) was dated May 3, 1944, and addressed to USA, WSA, American-Hawaiian S. S. Co., General Agents, in the sum of \$251.25, for the delivery of 25 cases of eggs, medium A, 750 dozen at \$0.335 per dozen, \$251.25; to be delivered pursuant to American-Hawaiian Steamship Company purchase order No. 922, to the S. S. *Czechoslovakia Victory*. Nystrom testified to the delivery of these products at Pier 2, Alameda, California, together with copies of the invoice given to him by Berman, one of which was returned to Berman after being receipted for at the ship (R. 2511). FBI Agent Johnson and Major Evans visited the ship on May 5, 1944. They identified the 25 cases of eggs in the ship's chill box. None of these cases bore the USDA inspection stamp but all bore the Nye & Nissen label with a rubber stamp in purple ink reading "Medium Grade A." To determine the grade and weight, 3 cases of eggs were examined. Major Evans testified

that his examination by candling and weighing these 3 cases was as follows:

Case 1: Inspection showed 18% A, 47% B, 23% C, 3% U. S. Dirties, 3% Checks, 6% Inedibles. The inedibles in this case consisted of 4 mixed rots and 2 stuck yolks, indicating that they were storage eggs. Net weight 38 pounds 12 ounces, grading U. S. Grade C Small.

Case 2: Inspection showed 23% A, 52% B, 22% C, 2% Inedibles, the latter consisting of stuck yolks, again indicating storage eggs; net weight 38 pounds 12 ounces, grading U. S. Grade C Small.

Case 3: Inspection showed 45% B, 45% C, 10% Inedibles. In this case there were no AA and no A eggs. Disregarding the inedibles the case graded C (R. 2681-2687).

While it appears that these eggs were delivered to the ship on May 3 and not examined by the Government officers until May 5, it is to be noted that the witness Hanson, who supervised the loading of the ship, testified that the eggs were loaded into the chill box of the ship immediately upon delivery at the pier (R. 2306).

S. S. "Henry White" (count 7)

The evidence relating to this ship completely proves the allegation of the seventh count of the indictment. The invoice involved is exhibit 53, issued by Nye & Nissen on May 3, 1944, and directed to USA, WSA, De La Rama S. S. Co., General Agents, in the sum of \$1,263.56, for the delivery of 50 cases of eggs,

medium processed AA, 1,500 dozen at \$0.41 per dozen, \$615.00; to be delivered pursuant to The De La Rama Steamship Co., Inc., purchase order No. 3601, to the S. S. *Henry White* at the Howard Terminal, Oakland, California.

Nystrom delivered these products to the ship on May 3, 1944, at the Howard Terminal, by direction of Berman (R. 2505, 2506).

Upon being advised of this delivery FBI Agents Magee and Johnson, in company with Colonel Hand of the Army, boarded the ship, which was new and preparing to sail on her first voyage. These officers found the 50 cases of eggs all bearing Nye & Nissen labels in the ship's chill box, and it was observed that 42 of these cases bore the stamp of the USDA inspection and 8 cases were unstamped. In examining these unstamped cases, Agent Magee removed three small cards, two of which were marked in pencil with the word "pullet" and one with the word "peewee." (Ex. 36, 37, 38; R. 2884, 2885.) Agent Johnson weighed the 8 unstamped cases and found that 6 of them had a net weight each of less than 34 pounds, denoting that they were peewee. The other 2 each weighed slightly over 34 pounds and, therefore, were classified as small.

Colonel Hand testified in detail to his examination of these eggs by candling. He candled 100 eggs in each of five cases, four of which bore the USDA stamp, the other being unstamped. The result of this examination was that no grade was given to any of the five cases because of rots and inedible eggs, but

excluding this feature all the eggs graded either B or C. (R. 549-574.)

The Government also produced as a witness Van Winkle, who was chief steward of this ship on its first voyage. He testified that shortly after the ship had started on this voyage he made an examination of a number of cases of eggs in the chill box and found that they were very small, being described by him as peewee eggs. He also examined some of the eggs in the galley and found that the first two or three rows on the top of every case were of fairly good size and after that they got down to peewee eggs (R. 2365-2375).

The fraudulent character of the invoice described in the seventh count has thus been abundantly proved.

S. S. "Cape Breton" (overt act D, count 1)

Overt act D of count 1, as alleged in the indictment, reads as follows:

D. On or about the 10th day of May 1944, defendant Ruby Jutland Goddard caused forty-five cases of eggs to be sold to the United States of America—War Shipping Administration, Matson Navigation Co., General Agent, and to be delivered to the Steamship *Cape Breton* at Pier 30 in the City and County of San Francisco, State of California, which eggs were of a lesser grade, weight, and price than that represented to said purchaser.

On May 10, 1944, Nye & Nissen issued its invoice directed to USA, WSA, Matson Navigation Company, General Agents, for \$778.01 for the following prod-

ucts: 45 cases eggs, processed, medium AA; 420 pounds butter; 84 pounds California loaf cheese; 20 pounds cheese, grated; 63 pounds Romano Dolce cheese. The products named in the invoice were delivered at the Matson Pier 30 by Charles Ranson, a truck driver then working for Nye & Nissen. Goddard ordered Ranson to make this delivery and designated the eggs which were to be loaded. Goddard first brought to him a flat of eggs, and then on a hand truck brought him 10 additional cases of eggs, telling him to mix these with the other cases. Ranson noticed that the cases on the flat had the USDA inspection stamp on them, marked grade AA eggs. The 10 cases brought by Goddard on the hand truck bore no USDA stamp, but had a purple "P" stamped on the end. When Ranson started to load the latter eggs he noticed they were appreciably lighter in weight, and he made the remark to Goddard that he did not like to deliver such light weight eggs. Goddard replied "It's all right. Go ahead and load those." In response to Goddard's instructions he mixed the light cases with the others in loading his truck. Goddard also gave him at the same time several copies of the Nye & Nissen invoice, together with a delivery receipt, all of which accompanied the load (R. 1393-1399).

On this same day, May 10, 1944, FBI Agent Johnson saw the eggs and other products at the Matson Pier 30 in San Francisco. He was alone at the time and he placed identifying marks on some of the containers. The next day, May 11, 1944, this merchandise having been moved to Pier 15, Agent Johnson, accompanied

by Major Evans, went to Pier 15 and, having identified the various containers, made an examination. Of the 45 cases of eggs, 36 bore the USDA inspection stamp and 9 cases were unstamped, the latter all bearing the purple "P." These 9 cases were weighed by Agent Johnson, and he found that 3 of them weighed, respectively, 34 pounds, 36 pounds, and 34 pounds 4 ounces, thus being classified as light. The other 7 cases all weighed less than 34 pounds and were classified as peewees (R. 3028-3033).

Agent Johnson also weighed cheese which bore the Nye & Nissen label. The California loaf cheese which was invoiced at 84 pounds had an actual weight of 77 pounds and 7 ounces. This was labeled "Cheddar Cheese—Mendocino." He also weighed the Romano Dolce cheese which was invoiced at 63 pounds. The net weight was 53 pounds and 14 ounces (R. 3034, 3035).

Major Evans confirmed the testimony of Mr. Johnson as to the number of stamped and unstamped cases of eggs and that they all bore the Nye & Nissen label. He examined four cases of eggs by candling, two of which bore the USDA inspection stamp and two having no such stamp. The result of his inspection was as follows:

Case 1: Stamped; indications were found in this case that the eggs were storage eggs. By candling they graded 12% AA, 44% A, 18% B, 2% C, 1% Blood Spots, 1% Checks, 2% Inedibles, one of which was a moldy egg with mold in the interior of the shell, and the other was a white rot. The mold is a condition that

develops in storage and takes a long time to develop, probably two months or more. Aside from the inedibles, this case graded A.

Case 2: No USDA stamp but purple "P" on label; candling showed 72% AA, 18% A, 3% B, 2% C, 1% Blood Spots, 2% Checks, 2% Inedibles, that is Blood Rots. Net weight 35 pounds 8 ounces; grade of case A Small.

Case 3: Bore USDA inspection stamp. Inspection showed 56% AA, 30% A, 11% B, 1% Blood Spots, 2% Checks; weight 39 pounds 14 ounces; grade of case A Small.

Case 4: Bore USDA inspection stamp; inspection showed 43% AA, 39% A, 14% B, 1% Meat Spots, 2% Checks, 1% Inedibles. Weight was 39 pounds 12 ounces; case graded A Small.

Major Evans graded the whole lot of eggs, disregarding the inedibles, as A small.

From the foregoing it will be seen that the allegations of overt act D of count 1 are definitely proved.

S. S. "Cape Cumberland" (overt act E, count 1)

Overt Act E of count 1, as alleged in the indictment, reads as follows:

E. On or about the 10th day of May 1944, defendant Henry Eugene Berman, at the San Francisco plant of defendant Nye & Nissen, a corporation, scraped weights off of four cases of California loaf cheese and caused said cheese to be sold to the United States of America—War Shipping Administration, Moore-McCormack Steamship Co., General Agent, and to be

delivered to the Steamship *Cape Cumberland* at Berth 6, Outer Harbor, City of Oakland, State of California, and caused said purchaser to be charged for more pounds of cheese than were actually delivered.

On May 10, 1944,¹ Nye & Nissen issued its invoice directed to USA, WSA, Moore-McCormack Steamship Co., General Agent, in the amount of \$564.04, for certain eggs, butter, and cheese delivered to the S. S. *Cape Cumberland*, Berth 6, Outer Harbor, Oakland, California (Ex. 140). The significant evidence connected with this transaction relates only to the fact that the weights were scraped off the four cases of California loaf cheese, the weight of the cheese being misrepresented on the invoice so that the Government was defrauded.

Nystrom recalled the preparation of this shipment for delivery to the ship and observed that Berman and Robinson, a truck driver for Nye & Nissen, scraped the weights off the wooden boxes of Cheddar loaf cheese included in the order and described in the invoice. This was on May 10, 1944. (R. 2524-2526.)

On the following day, May 11, 1944, FBI Agents Magee and Johnson, with Major Evans, visited the S. S. *Cape Cumberland* at Berth C, Outer Harbor, Oakland, and weighed the cheese described in the invoice, a copy of which was available to them at the ship. Mr. Magee testified that four cases of cheese labeled "California Cheddar Loaf Cheese, Factory No. 1621, Nye & Nissen, SF" were observed on the ship. These were invoiced at 120 pounds, and the

actual weights as determined by the Government officers were as follows:

Case 1.....	26 pounds, 4 ounces
Case 2.....	26 pounds, 8 ounces
Case 3.....	25 pounds, 5 ounces
Case 4.....	26 pounds, 5 ounces
<hr/>	
Total weight.....	104 pounds, 6 ounces

It thus appears specifically and clearly that there was a reason for scraping the weights off the boxes, namely, to deceive the receiving clerk or steward of the ship and thus to avoid detection of the fraud in the invoice. Clearly the allegation of overt act E of the first count was proved.

S. S. "John Muir"

On April 24, 1944, Nystrom, truck driver for Nye & Nissen, delivered to this ship at the Naval Supply Depot, Oakland, 48 cases of eggs together with the Nye & Nissen invoice directed to United States of America, War Shipping Administration, Alaska Packers Association, General Agents. This invoice, also dated April 24, 1944, was for \$1,292.91 in payment for products including "48 cases Medium Processed AA Eggs" (Ex. 65).

Nystrom assembled the truckload under Berman's direction, and the latter instructed him to load 38 cases bearing the USDA inspection stamps and to mix with these on his truck 10 cases secured from Goddard which bore no official stamp but had a large purple "P" on the labels. He heard Goddard suggest the inclusion of these 10 cases, and in lifting them he noticed that they were substantially lighter in weight (R. 2462-2474).

On the same day, having been advised of this delivery by Nystrom, FBI Agent Magee, accompanied by Colonel Hand of the Army, boarded the ship and found 48 cases of eggs in the chill box with the same markings described by Nystrom. Sample labels of both stamped and unstamped cases are in evidence as exhibits 67 and 68, which show the purple "P" on one and the USDA stamp indicating grade AA on the other. Colonel Hand candled 3 cases of the peewees and 2 of the other 38. The former were graded B although they contained rots, checks, and dirties. The latter could be given no grade on account of 5% rots. Otherwise they graded C. The 3 cases of peewees weighed less than 28 pounds per case, the minimum weight for medium eggs being 40 pounds (R. 590-597; 2859-2865).

Mahoney, mess man on this ship, testified that on this voyage he observed the eggs both in the galley and when being served and that many were inedible and rotten (R. 1641-1656).

S. S. "Josiah Royce"

On April 25, 1944, Nystrom, truck driver for Nye & Nissen, delivered to this ship at the Outer Harbor, Oakland, 60 cases of eggs, together with the Nye & Nissen invoice directed to USA, WSA, Isbrandtsen Steamship Corporation, General Steamship Corporation. This invoice, also dated April 25, 1944, was for \$1,427.82 in payment for products including "60 cases Large Processed Grade AA eggs" (Ex. 61).

By instructions of Berman, the truck was loaded the evening before the delivery. On instructions of

Berman, Nystrom loaded 50 cases of eggs bearing the USDA stamp and 10 cases received from Goddard which bore no stamp but had a purple "P" on the label. Delivery was made to the ship at about 8:30 in the morning, and while the eggs were being unloaded the steward of the ship segregated the 10 cases bearing the letter "P," removing the tops, and rejected these 10 cases. Nystrom thus saw the eggs and testified that they were very small, saying "I would say the size of a pigeon egg or a little larger than my ring here." On instructions from the steward, he returned these 10 cases to the Nye & Niseen plant. Other eggs were sent to the ship to replace them (R. 2475-2486).

On the same day, having been advised of this delivery by Nystrom, FBI Agent Magee, accompanied by Colonel Hand, boarded the ship and secured a copy of the invoice exhibit 61, which called for 60 cases large AA eggs. They found 50 cases in the chill box and 10 cases on the pier. The latter were examined and found to be very small eggs. Colonel Hand candled 4 cases of these eggs and thereby determined that they were entitled to no grade because there were 2.7% inedible rotten eggs (R. 585-590). Both Magee and Hand corroborated the markings on these cases. Regardless of the size of the eggs, they failed entirely to meet the specifications contained in the invoice, which was obviously fraudulent.

S. S. "Cape Pillar"

On April 26, 1944, Berman directed Nystrom to load 45 cases of eggs for this ship, to be delivered

at Pier 34, San Francisco. These 45 cases consisted of 35 cases stamped with the USDA inspection stamp and the 10 cases marked with the purple "P" which had been rejected by the S. S. *Josiah Royce* the previous day and were still segregated on the floor of the warehouse. Berman warned Nystrom to avoid the trouble he encountered on that occasion and to mix them upon his truck. He carried with him the Nye & Nissen invoice (Ex. 57) dated April 25, 1944, for \$563.30, describing "45 cases Medium Processed AA eggs" (R. 2491-2493).

On the same day FBI Agents Magee and Johnson, accompanied by Colonel Hand, boarded the ship. They confirmed the markings on the 45 cases of eggs. The 10 unstamped cases were weighed and proved to be peewee or pullet eggs. Colonel Hand candled 3 cases of the eggs bearing the USDA stamp and graded them as "Small, Grade B." Exhibit 59 is a box containing 9 eggs from one of the unstamped cases and demonstrates the small size of these eggs. The fraudulent character of the invoice was thus established (R. 574-585; 2871-2876).

S. S. "Phillipa"

The evidence relating to this transaction establishes the fact that the invoice of Nye & Nissen (Ex. 84) was dated May 3, 1944, and describes 65 cases medium AA eggs, with a quantity of butter and cheese, delivered to the S. S. *Phillipa* at Pier 30, San Francisco. The invoice is addressed to USA, WSA, Matson Navigation Company, General Agent.

Nystrom testified to the delivery of these products at Pier 30 (R. 2512-2514). On May 5, 1944, FBI Agent Johnson, with Major Evans, visited the ship. They found the 65 cases of eggs bearing the Nye & Nissen label in the ship's chill box, 50 of which bore the USDA inspection stamp and 15 bore no such stamp. Major Evans examined 6 cases by candling, 2 being unstamped cases and 4 bearing the USDA stamp. A seventh unstamped case was weighed. Of the unstamped cases, Major Evans testified that one graded B small, the weight being 34 pounds and 2 ounces, and the other graded A small, weighing 34 pounds 12 ounces. In the latter case a card (Ex. 41) with the penciled word "peewee" was found. The 4 stamped cases all contained many inferior eggs, and 3 of them graded A medium and the fourth B medium (R. 2674-2680). The unstamped case which was weighed but not candled weighed 33 pounds and 12 ounces, thus being classified as peewee.

The finding of the peewee card in one of these cases corroborates the testimony of Pineda that such cards were placed in cases of peewees by the girl candlers (R. 508-511).

It further appears from Nystrom's testimony that he identified exhibit 77, which was a form of receipt in Goddard's handwriting which Nystrom carried to the ship when he delivered the load and secured thereon the signature of the receiving clerk at the Matson Pier.

This transaction and the evidence sustaining it are in line with what occurred in connection with other

ships, and this evidence was offered and received by the Court both as a similar transaction to prove the knowledge and intent of the defendants in the substantive counts and also as an overt act in furtherance of the conspiracy described in the first count.

S. S. "William A. Coulter"

The evidence relating to this transaction is in exactly similar trend to those previously described. The false invoice is exhibit 169 and is addressed by Nye & Nissen to USA, WSA, Hammond Shipping Company, General Agent. It is dated May 8, 1944, and among other products describes 40 cases medium processed AA eggs, 1,200 dozen at 41 cents, \$492. Nystrom's testimony relates the delivery of this truckload to the S. S. *William A. Coulter* at Pier 44, San Francisco. The documents were handled in the same way he has described for other deliveries (R. 2516-2520). On May 8, 1944, upon being advised of the delivery, FBI Agents Magee and Johnson accompanied by both Colonel Hand and Major Evans boarded this ship, found the 40 cases of eggs, all bearing the Nye & Nissen label, in the chill box and observed that of these cases 34 bore the USDA inspection stamp and 6 cases were unstamped. One of the unstamped cases, on being opened, disclosed a candler's card (Ex. 42) bearing the penciled notation "peewee" (R. 3012-3014).

The unstamped cases were weighed by Agent Johnson and Colonel Hand and had an average net weight of 33 pounds 10 ounces, classifying them as peewee (R. 3019). Major Evans candled four cases, all of

which bore the USDA stamp. Two of these graded A small, and of the other two, one graded B small and the other B medium (R. 2688-2691). Thus the fraud is clear.

S. S. "Heber M. Creel"

The evidence in connection with the delivery of Nye & Nissen products to this ship relates only to short weights of cheese, although both eggs and butter were included in the shipment.

The invoice of Nye & Nissen (Ex. 164) is dated May 12, 1944, and addressed to USA, WSA, Olympic Steamship Company, for delivery to the S. S. *Heber M. Creel*.

Nystrom testified that he particularly recalled this delivery because it was made the day before he left the employ of Nye & Nissen.

Two incidents in connection with preparing for the delivery were recalled by Nystrom. In checking his load with the invoice he found that the order called for six cases of American processed cheese but there were only five such cases given to him by Berman. On calling the latter's attention to this fact, Berman replied "We'll substitute a case of Cheddar loaf cheese. That will give the right amount of packages." He further recalled that there was one case of Romano Dolce cheese in the order, invoiced at 65 pounds but the case was clearly stamped in purple ink "Net Weight 56 lb." He drew that to Berman's attention because previously he had seen the weights scraped off the boxes, and he said to Berman, "Do you wish to scrape the weight off this box?" Berman replied,

“No, I’m going to let it go this time. I want to see what happens” (R. 2526–2531, 2606).

On the following day, May 13, 1944, FBI Agent Magee weighed the cheese on shipboard. He found five boxes of American processed cheese instead of the six boxes mentioned in the invoice. In place of the sixth box of American processed cheese, which was priced at 34.9 cents per pound, there was substituted a box of Cheddar loaf cheese at 29.5 cents per pound. Mr. Magee also noted that one case of Romano Dolce cheese which was invoiced at 65 pounds in fact weighed 54 pounds and 3 ounces, and it bore the stenciled stamp on the box showing a weight of 56 pounds.

Thus the testimony of Nystrom was confirmed regarding the short weights, and also the practice of scraping weights off the cheese boxes disclosed in connection with the S. S. *Cape Cumberland* incident is corroborated, giving further proof of a fraudulent course of conduct as alleged in overt act E of the first count of the indictment (R. 2897–2901).

S. S. “James Oliver”

The transactions relating to this ship were received in evidence as an overt act in furtherance of the conspiracy alleged in count 1 and also as a similar transaction to illuminate the criminal intent and the course of conduct which marked the substantive counts.

The invoice covering the delivery of eggs to the S. S. *James Oliver* is exhibit 147. It is dated May 23, 1944, and addressed by Nye & Nissen to USA, WSA, Alaska Transportation Company, General Agent, for products

delivered to the S. S. *James Oliver* at the Moore Dry Dock No. 4, Oakland, California. The invoice described eight cases of medium AA processed eggs and two boxes of butter, in the sum of \$153.90.

FBI Agent Magee and Major Evans visited this ship on the same day, namely, May 23, 1944, and the eight cases of eggs were examined. The ship was in dry dock at Oakland, and the supplies covered by the invoice were port stores for consumption during the period that the ship was in dry dock. Agent Magee testified that he examined the invoice at the ship, found the eight cases of eggs in the chill box, and observed that none of the cases bore any inspection stamp and only two bore the Nye & Nissen paper label, the other six having stenciled labels including the words "Nye & Nissen, San Francisco." (R. 2903-2906.)

Major Evans candled the eggs in three of these cases, with the following results:

Case 1: Contained 70% Grade A, 20% B, 3% C, 3% Light Dirties, 4% Checks. Net weight 38½ pounds. Case graded B Small.

Case 2: This case bore a pencil mark on top of the case, "D-Med." This indicated to witness, as an expert in the egg trade, "Dirties, Medium." Examination of the eggs in this case showed 42% U. S. Light Dirties, 56% U. S. Dirties, 1% Checks. Net weight 38 pounds, 6 ounces. U. S. Light Dirties and U. S. Dirties are given no grade.

Case 3: Inspection showed 56% Grade A, 32% B, 6% C, 2% Blood Spots, 2% Checks,

2% Inedibles, consisting of stuck yolks. Net weight 38 pounds, 4 ounces. Case graded B Small.

He further testified that none of these eggs were processed and that the entire lot could not be given any grade owing to the dirty eggs and stuck yolks.

The invoice of Nye & Nissen having charged the Government for eight cases of medium AA processed eggs, the fraud in the transaction is obvious (R. 2716-2722).

ARGUMENT ⁶

I. The Court did not err in denying the motion to quash the indictment, in overruling the demurrer and in denying the motion for a bill of particulars

The appellants' brief (pp. 59-69) argues their claim of error in connection with the motion to quash and the demurrer, first, as to count 1, the conspiracy, under their subhead A, second, as to counts 2 to 7, the substantive counts, under subhead B, and the denial of the motion for a bill of particulars under subhead C. In answering their arguments we will utilize the same subheads.

A. As to Count 1

Appellants say in their brief (p. 59) :

The essence of a conspiracy to defraud the United States is an agreement for that purpose. The agreement must be distinctly, directly, and specifically alleged. This the Government entirely failed to do in the first count. All the Government did was to allege generally that the defendants conspired to defraud the United

⁶ In our argument we are answering the "Points" of appellants' brief in the same order and under the same numbers.

States and followed this general allegation by a statement of what was done.

The brief then quotes from *Hamner v. United States*, 134 F. (2d) 592, 595, which supports their contention that such an indictment is insufficient.

But the above quotation from their brief is *a complete misstatement* of the indictment. In fact the indictment most definitely, distinctly, and directly alleges what the conspirators agree to do, that is, what comprised the conspiracy. After a comprehensive statement of the purposes of the conspiracy there follow eleven statements of what the conspirators *would do* as a part of the plan (agreement) and conspiracy. Then follow allegations of what *was in fact done* in furtherance of the conspiracy, that is, the overt acts. Thus it is apparent that appellants' counsel either have not read or have misapprehended the language of the indictment.

A situation of almost identical import appears in *United States v. Kendzierski*, 54 F. Supp. 164. The defendants in that case moved to quash the indictment for the same reasons urged here. In referring to their argument the Court says at page 166 of the report:

The next seven pages are devoted to cases sustaining these statements, heaviest reliance being placed on the *Hamner* case (*Hamner v. United States*, 5 Cir., 134 F. 2d 592), which was a prosecution under the same statute, where the Court in quashing the indictment stated (134 F. 2d at page 595): "Confused allegations of what the defendants did are by a sort of inference sought to be made allegations of what

they conspired to do * * *. What was done is often good evidence of what was agreed to be done, but to allege such evidence is not an allowable substitute for a clear statement of the agreement which is proposed to be proven." But the defendants' suggestion that the present case is controlled thereby evidences that they have misread the indictment by which they are accused. Far from being analogous to the Hamner indictment, it would appear that the instant indictment may well have been drawn with an eye to avoiding the very defect there revealed. The second and third paragraphs of this indictment (as set forth in the accompanying footnote) do not relate to acts done in pursuance of the agreement but are clearly allegations of what comprised the conspiracy itself, viz.—what the participants agreed to do, namely, that they "would unlawfully buy, obtain," etc., and that they "would give, sell, and distribute" etc. What the defendants actually did thereafter to effect the object of this conspiracy is set forth in the latter part of the indictment as **Overt Acts**. The indictment sufficiently sets forth the crime charged and is not defective on the first ground asserted.

The complete analogy between that decision and the instant case is apparent from the reading of the portions of the indictment as they appear in the footnote on page 166 of the report, and no further argument is necessary to refute this claim of appellants herein.

It is next asserted in appellants' brief (pp. 61, 62) that the allegation in the indictment "that the defendants allegedly conspired to impede, impair, obstruct,

and defeat the lawful functions of a department of the United States of America is a mere conclusion of law" and is therefore inadequate.

This allegation of the indictment is one of the component parts or purposes of the conspiracy and reads as follows (R. 5):

B. By impeding, impairing, obstructing, and defeating the lawful functions of the United States Department of Agriculture, War Department, and Navy Department in the inspection, grading, weighing, and purchase of butter, cheese, and eggs.

In criticizing this allegation the appellants consider only a portion of it, take it away from its context and consider it apart from the indictment as a whole, thus violating a basic principle of construction. See *United States v. Ozark Cannery Ass'n*, 51 F. Supp. 150, 152, where the Court says:

The court must examine the indictment as a whole. The relationship between all the various paragraphs must be borne in mind. "The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *United States v. Patten*, 226 U. S. 525, 544, 33 S. Ct. 141, 145, 57 L. Ed. 333, 44 L. R. A., N. S. 325.

But, even as read, without reference to other parts of the indictment, it leaves no doubt in the minds of the accused of the offense charged and what they must meet in defense. So long as they are so advised and are protected against another prosecution for the same

offense, the indictment is sufficient. *United States v. Cruikshank*, 92 U. S. 542, 558.

It is further asserted in appellants' brief (p. 62) that the indictment is defective because in charging a continuing conspiracy from the year 1938 it is related to acts involving the WSA, which did not come into existence until 1942. This claim is completely answered by this Court in *Rose v. United States*, 149 F. (2d) 755 (C. C. A. 9), in the 1st syllabus and the corresponding text on pages 757 and 758, reading as follows:

Appellants complain that the district court erred in overruling their demurrers to the indictment because, they insist, the indictment fails adequately to state an offense against the laws of the United States. They claim the indictment defective in charging a conspiracy commencing December 12, 1941, to violate the Second War Powers Act, which was not adopted until March 27, 1942. The claim is unfounded as the conspiracy was unlawful under previous statutes named in the indictment and continued to be unlawful under the subsequently enacted statutes.

Again, on page 62 of their brief, appellants seem to imply that the indictment is duplicitous in that it charges several unrelated conspiracies in a single count. However, the charge here is of a single conspiracy with its objects extending over a period of years and including numerous offenses. The evidence clearly established that theory of the case, and it is necessary to refer only to *Braverman v. United States*,

317 U. S. 48, to show the propriety of that theory as expressed in the allegations of the indictment.

B. As to Counts 2 to 7, the Substantive Counts

On pages 62 to 64 of their brief the appellants argue that the substantive counts are invalid because "it does not appear from the indictment that the fraudulent and fictitious statements alleged to have been made were in fact in a matter within the jurisdiction of any department or agency of the United States."

Again it appears that counsel for appellants have either not read or have misapprehended the character of the allegations of the indictment in these counts. There is no charge in the indictment that the defendants made false claims against the several shipping companies mentioned in these counts, but in each of said counts it is definitely stated that the invoice from Nye & Nissen was addressed to the United States of America, War Shipping Administration, and then naming the general agent as acting for WSA. As a matter of inducement and preliminary allegation it is alleged that the particular shipping company had a general agency contract with WSA to manage and conduct the business of vessels assigned to it "by the United States, for the United States, and under the directions, orders, and regulations of the United States."

As a typical example, we refer to the allegations in the third count of the indictment, which relates to supplies furnished to the S. S. *Mission San Diego*, which was under the control of WSA and assigned

for the management of its operations to Deconhil Shipping Company. Not only do the allegations of the indictment charge that the false invoice of Nye & Nissen was directed to the United States of America, War Shipping Administration, but the proof shows, as set forth in the statement in this brief relating to the S. S. *Mission San Diego* (Br. pp. 58, 59) and as hereafter explained, that the payment of this invoice was made out of Government funds supplied to the general agent in the form of a revolving fund in which a balance of such funds was always maintained. As an example of the manner in which the business of WSA was performed, we have directed attention to the testimony of Hugh Gallagher in a footnote to the factual statement at page 3 of this brief. In connection with the third count, which we are using as an example, we refer to the testimony of Leslie R. Kerdell, the secretary and treasurer of Deconhil Shipping Company, appearing on pages 2278 to 2283 of the record, wherein again is explained the character of the agency relationship between the shipping company and WSA and the manner of payment. We also refer to exhibit 4 herein, which is a certified copy of the contract between WSA and Deconhill Shipping Company. It is nowhere claimed either in the indictment or in the brief that these shipping companies were departments or agencies of the United States, the uniform claim made in the several counts, as above noted, being that the false and fraudulent invoices were submitted to WSA and paid by WSA.

The case of *Lowe v. United States*, 141 F. (2d) 1005, which is cited by appellants is not at all in point. In that case the alleged false claim was submitted to a private corporation of which the defendant was an employee, the latter being then engaged in building ships under a contract with the Maritime Commission, an agency of the United States. The remote connection between the defendant in that case and the Government agency is in nowise analogous to the situation which obtains in the instant case.

From the foregoing it clearly appears that there is no infirmity in the indictment in the respect charged by appellants.

C. The Denial of Motion for Bill of Particulars

The defendants' motion for a bill of particulars extends from page 41 to page 56 of the record and comprises 106 specifications wherein they ask further particulars. In effect the motion asks for the Government's evidence in its entirety and amounts to a bill of discovery.

The indictment, taken as a whole, is an exceedingly specific document, and it advises the defendants of every element of the Government's case. In appellants' brief, at page 65, they say, "In urging that the Court erred in denying the said Bill we are not unmindful of the rule of practice which declares that ordinarily a motion for a Bill of Particulars is addressed to the sound discretion of the trial Court and that this discretion should not be the subject of review except where manifest prejudice has resulted."

Their having conceded that much, it seems necessary only to direct the Court's attention to two Ninth Circuit decisions as follows:

In *Rubio v. United States* (C. C. A. 9, 1927), 22 F. (2d) 766, cert. den. 276 U. S. 619, the Court said in part (pp. 767-768):

2. Speaking generally, the government has no knowledge of the exact time or place of the formation of the conspiracy, and to require it to specify the particular time and place, and limit the proof to that time and place would defeat almost every prosecution under this act. For these reasons, we are satisfied that the time and place of the formation of the conspiracy are sufficiently fixed by the overt acts set forth in the indictment. *Fisher v. United States* (C. C. A.), 2 F. (2d) 843; *Woitte v. United States* (C. C. A.), 19 F. (2d) 506.

3. To require the government to set forth every act tending to connect each of the parties charged with the conspiracy, and every act committed by each of the parties in furtherance of the object of the conspiracy, would be to require it to make a complete discovery of its entire case. Such is not the office or function of a bill of particulars. In almost every prosecution facts and circumstances are given in evidence of which the charge in the indictment gives no notice. If the defendant is taken by surprise, the court has ample power to protect him by granting a continuance upon a proper showing, or by granting a new trial if his rights cannot otherwise be safeguarded; but, if not taken by surprise, he has no just ground for complaint.

Robinson v. United States (C. C. A. 9, 1929), 33 F. (2d) 238, 240, is to the same effect.

United States v. General Petroleum Co., 33 F. Supp. 95 (D. C. So. Calif.), at page 99, cites with approval the *Rubio* case on its point 3 set forth above.

In *Mulloney v. United States* (C. C. A. 1, 1935), 79 F. (2d) 566, cert. den. 296 U. S. 658, the Court said, at page 572:

The purpose of a bill of particulars is the better to apprise the defendant of the crime charged to enable him properly to prepare his defense. It is not to furnish him in advance with the government's evidence and, if the indictment properly sets forth a crime, a motion of this character which would unduly limit the evidence of the government should not be granted. *Rubio v. United States* (C. C. A.), 22 F. (2d) 766; *Robinson v. United States* (C. C. A.), 33 F. (2d) 238; *United States v. Brown* (D. C.), 56 F. (2d) 659.

We further direct the Court's attention to the fact that appellants' brief makes only a bare statement that prejudice resulted from the failure of the trial court to grant the motion for a bill of particulars, but they have established no surprise or prejudice, and certainly the Government was not required to make available to the defendants all of its evidence.

In *Stumbo v. United States* (C. C. A. 6, 1937), 90 F. (2d) 828, cert. denied 302 U. S. 755, the court at page 832 said:

Likewise within the discretion of the court was the motion for a more specific bill of par-

ticulars. *Wong Tai. v. United States*, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545. The original bill went into considerable detail. The motion for amplification requested information concerning the minutest items of evidence. We know of no invasion of the rights of defendants in the failure of the court to require that the government lay before them its entire case.

In *Sawyer v. United States* (C. C. A. 8, 1937), 89 F. (2d) 139 at 141, the court said:

If the language of the indictment is so far definite and certain as to safeguard all of the rights of a defendant and to enable him properly to prepare his defense, a bill of particulars will not be required. *Bedell v. United States* (C. C. A.), 78 F. (2d) 358. The granting or the refusal of a motion for a bill of particulars is a matter that is governed by the sound judicial discretion of the trial court, and unless it shall be shown affirmatively that such discretion has been abused by the trial court a refusal to require a bill of particulars will not be disturbed by an appellate court. *Peck v. United States* (C. C. A.), 65 F. (2d) 59; *Bedell v. United States* (C. C. A.), 78 F. (2d) 358, 362; *Rubio v. United States* (C. C. A.), 22 F. (2d) 766; *Olmstead v. United States* (C. C. A.), 19 F. (2d) 842, 844, 53 A. L. R. 1472.

The granting of the bill of particulars rested in the sound discretion of the Court, and that discretion was not abused. There is no merit to this contention of appellants.

II. The Evidence was Overwhelming to Sustain the Verdict on Every Count of the Indictment and the Trial Court Properly Denied the Motions for Directed Verdicts of Acquittal

Appellants present their arguments on Point II under four subheads and we answer these arguments in the same manner.

A. The Proof as to Moncharsh Was Insufficient in Support of His Guilt Under the Conspiracy Count

In our statement we have amply demonstrated his guilt and his initial and continuing responsibility for the fraud and deceit which marked the operations of his company during the entire period of the conspiracy. But, at some cost of repetition, we will briefly enumerate the items of evidence showing his control of and participation in the scheme:

(1) He was admittedly president of the corporation and the owner of a large proportion of its stock.

(2) He had charge of the Nye & Nissen plants. If anything went wrong, or if anything had to be done, he was the man to give the final orders. If Goddard was not around, and the employees were doing something wrong, he would correct them. He had general supervision of all the operations of the plant (Pineda—R. 446).

(3) He came down to the floor of the warehouse every day, about ten or eleven (Pineda—R. 471).

(4) Trina Robles, Nye & Nissen bookkeeper, identified Moncharsh as being in charge of the business of the company in the San Francisco office (R. 3158).

(5) Major Evans stated that he had conversations with Moncharsh at various times up until December 1943 if he had certain difficulties in regard to inspections (R. 2640-2642).

(6) Occasionally he would supervise the unloading of eggs on the floor of the main warehouse; also he would pass on to Goddard the orders received by the company for deliveries of eggs (Pineda—R. 460).

(7) Andrade identified rubber stamp similar to that of USDA in possession of Moncharsh (R. 3223).

(8) Andrade stated that Moncharsh gave him orders to buff inspection stamps off cases of eggs that Moosman had inspected (R. 3240).

(9) Andrade had conversation with Moncharsh about the eggs rejected by Colonel Kielsmeier, and Moncharsh told Andrade how to handle the situation so as to deceive that inspector (R. 3248-3251).

(10) Andrade saw Moncharsh using rubber stamp to stamp up cases of eggs after Moosman had left plant, and Moncharsh almost got caught by Moosman when he returned unexpectedly (R. 3258, 3259).

(11) Andrade states that he stamped up cases of eggs with rubber stamp under instructions of Moncharsh (R. 3293).

(12) On one occasion early in 1944, Moncharsh called Mericle to inspect eggs at the Nye & Nissen plant. In doing so, Moncharsh advised him of the grade and size of the order to be inspected (R. 243).

(13) Also, he sometimes called Hand to the Nye & Nissen plant to inspect some eggs or butter (R. 367, 394).

(14) When Moncharsh called him to inspect eggs, Hand would follow the procedure which he outlined in making that inspection (R. 394, 395).

(15) About June 1941, Moncharsh told Goddard and Menges to have the candlers prepare a number

of samples for an Army order, and to place cut-outs in cases similar to those called for by that order (Pineda—R. 1067-1070). It took about a week to put this order up. During this period, Moncharsh came in every day and watched what went on (R. 471).

(16) In February 1941 some cold storage eggs were brought into the Nye & Nissen plant. Moncharsh told Pineda and Nix to keep the cases far apart so that they would dry out fast. He said to do a good job as Colonel Hand would be coming out to inspect the eggs (R. 1152, 1153). About this same day he told Ruby Goddard to be sure to have enough cold storage eggs on hand at all times (R. 806). When Colonel Hand came down to inspect a little later, he was shown sample cases containing fresh eggs, which he passed. The lot which was actually delivered to the Army on this occasion, however, was mostly the cold storage eggs. The same sample cases of fresh eggs were inspected by the Colonel five or six times. On each of these times a similar switch was made, and the Army never got fresh eggs (R. 807-812).

(17) About November 1941, Moncharsh was present with the other defendants, Nix and Pineda, outside the candling room of the company's plant. At this time Goddard told them all to come back and transfer eggs after supper. They and some girl candlers did so (R. 891-893, 1237). They then transferred about 200 cases of inspected eggs (Veterinary Corps stamp) and replaced them with cut-outs from cases bearing a red label (R. 1233-1235). Early that evening Moncharsh and Berman helped transfer two

cases of eggs, but they were so awkward that they later helped cover and nail the cases instead (R. 894).

(18) Moncharsh was also present another evening when eggs were switched in a similar manner. On this occasion they had to break wire strapping, which indicated that the eggs were for Army export shipment (R. 897).

(19) About January 1940, Moncharsh was present when Goddard told Pineda that he would have to work that Saturday because the company had been caught red-handed on some eggs that had been delivered and inspected by the Army (R. 899).

(20) Moncharsh told Gartenberg to inspect the eggs and butter on board the S. S. *Clark* (November 1, 1943). Gartenberg did so and submitted a report to him showing how bad the eggs and butter were (R. 2101, 2102).

(21) Moncharsh told FBI Agents Magee and Johnson that he was familiar with the type and quality and grades of all eggs sold and delivered out of Nye & Nissen's plant in San Francisco; that he personally dictated all the policies of Nye & Nissen and regulated and decided the daily prices of their products (R. 4339-4340; 4346-4347).

B. The Evidence of the Case Was Sufficient to Support the Verdict Convicting Moncharsh Under the Substantive Counts

The long argument in appellants' brief to the contrary of the above proposition, extending from page 76 to page 88, can be answered in a short space. We have demonstrated Moncharsh's guilt under the con-

spiracy count both in our statement of the evidence and in the preceding argument under subhead A of this Point II. It has further unquestionably been shown that the offenses described in the substantive counts were all in furtherance of the conspiracy, that is to say, they were all overt acts committed in effecting its objects.

At several points in the trial, counsel for the appellants urged their motions for a directed verdict of acquittal, for a new trial, and in arrest of judgment on the same grounds as again argued here. In those motions they relied heavily on the case of *United States v. Sall*, 116 F. (2d) 745, where it was held that participation in the conspiracy was not itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. The trial court overruled all of those motions and rightly, because within two months after the close of the trial the Supreme Court decided the case of *Pinkerton v. United States*, 328 U. S. 640, specifically overruling the *Sall* case and saying (pp. 646-647):

Daniel relies on *United States v. Sall*, *supra*. That case held that participation in the conspiracy was not itself enough to sustain a conviction for the substantive offense even though it was committed in furtherance of the conspiracy. The court held that, in addition to evidence that the offense was in fact committed in furtherance of the conspiracy, evidence of direct participation in the commission of the substantive offense or other evidence from which participation might fairly be inferred was necessary.

We take a different view. We have here a continuous conspiracy. There is here no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. *Hyde v. United States*, 225 U. S. 347, 369. As stated in that case, "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence." *Id.*, p. 369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States v. Kissel*, 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. United States*, 163 U. S. 657-658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Cochran v. United States*, 41 F. 2d 193, 199-200. Yet all members are responsible, though only one did the mailing. *Cochran v. United States*, *supra*; *Mackett v. United States*, 90 F. 2d 462, 464; *Baker v. United States*, 115 F. 2d 533, 540; *Blue v. United States*, 138 F. 2d 351, 359. The govern-

ing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson v. United States*, 62 F. 2d 32, 34. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under § 37 of the Criminal Code, 18 U. S. C. § 88. If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.

This completely establishes the fallacy of appellants' argument.

C. The Court Did Not Err in Refusing to Direct a Verdict of Acquittal as to the Defendant Moncharsh

Appellants in asserting that the court erred in refusing to direct a verdict of acquittal as to Moncharsh, represent that the law is well settled that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to direct a verdict for the accused and cite some twenty-three cases in support thereof.

Appellants further assert that as to the appellate function the rule is that where all the substantial evidence is as consistent with innocence as guilt it is the duty of the appellate court to reverse judgment against the defendant, citing, among other cases, *Hammond v. United States*, 127 F. (2d) 752, (App. D. C. 1942).

The standard which appellants assert should have been adopted by the court below in passing on the motion for a directed verdict of acquittal is neither supported by the weight of authority nor is it in harmony with the most recent decisions of the Supreme Court upon the question. In *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, one of the defendants sought reversal of his conviction on the ground that there was no substantial evidence that he had knowledge of or participated in the unlawful conspiracy. He had raised the question by a motion for a directed verdict at the close of the case, and in the Supreme Court relied upon the doctrine of *Isbell v. United States*, 227 Fed. 788 (C. C. A. 8), upon which appellants here also rely. The Supreme Court said (310 U. S. at 254) :

* * * His motion for a directed verdict at the conclusion of the case was denied by the trial court and the Circuit Court of Appeals held that there was no error in such denial. A question of law is thus raised, which entails an examination of the record, not for the purpose of weighing the evidence but only to ascertain whether there was some competent and substantial evidence before the jury fairly

tending to sustain the verdict. *Abrams v. United States*, 250 U. S. 616, 619; *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 444; *Lancaster v. Collins*, 115 U. S. 222, 225.

See also *Glasser v. United States*, 315 U. S. 60, 80; *Gorin v. United States*, 312 U. S. 19, 32; *Pierce v. United States*, 252 U. S. 239, 251-252; *Stilson v. United States*, 250 U. S. 583, 588-589. Obviously, if substantial evidence is the proper test by which to judge the action of the trial judge in permitting a case to go to the jury, it is the proper test for the trial judge to apply on a motion for a directed verdict.

Almost every circuit court of appeals in the country has held that in situations where a finding of guilt depends on the inferences to be drawn from the circumstances proved, the determination whether such circumstances are sufficient to establish guilt beyond a reasonable doubt is for the jury and not for the court. *Morton v. United States*, 147 F. (2d) 28, 30 (App. D. C.), certiorari denied, 324 U. S. 875; *Yoffe v. United States*, 153 F. (2d) 570, 573 (C. C. A. 1); *United States v. Valenti*, 134 F. (2d) 362, 364 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States v. Picarelli*, 148 F. (2d) 997, 998 (C. C. A. 2); *United States v. Brandenburg*, 155 F. (2d) 110, 112 (C. C. A. 3); *United States v. Reginelli* 133 F. (2d) 595, 599 (C. C. A. 3), certiorari denied, 318 U. S. 783; *Roberts v. United States*, 151 F. (2d) 664, 665 (C. C. A. 5); *Whaley v. United States*, 141 F. (2d) 1010 (C. C. A. 5), certiorari denied, 323 U. S. 742; *Blalack v. United States*, 154 F. (2d) 591, 594

(C. C. A. 6), certiorari denied, 329 U. S. 738; *United States v. Levy*, 138 F. (2d) 429, 430-431 (C. C. A. 7), certiorari denied, 321 U. S. 770; *Braatelian v. United States*, 147 F. (2d) 888, 893 (C. C. A. 8); *Hansbrough v. United States*, 156 F. (2d) 327, 329 (C. C. A. 8); *Gorin v. United States*, 111 F. (2d) 712, 721 (C. C. A. 9), affirmed, 312 U. S. 19; *Scott v. United States*, 145 F. (2d) 405, 408 (C. C. A. 10); certiorari denied, 323 U. S. 801; *Rogers v. United States*, 129 F. (2d) 843, 844 (C. C. A. 10). When examined in relation to their facts, it is clear that the decisions relied upon by appellants hold no more than that a verdict of acquittal must be directed if the evidence, taken in the light most favorable to the Government and with all possible inferences drawn in favor of the Government, is still as consistent with innocence as with guilt. Those decisions do not hold that, where the inferences that reasonably can be drawn from the Government's evidence may establish guilt beyond a reasonable doubt, a verdict of acquittal must be directed merely because, by indulging in every possible inference in favor of a defendant, it is possible to devise an innocent explanation of defendant's conduct. If that were the rule, no case in which any inference must be drawn by the jury could stand. See *United States v. Valenti*, 134 F. (2d) 362, certiorari denied, 319 U. S. 761, *supra*.

If any conflict in fact exists between the decisions of the various circuits, all doubt respecting the proper standards to be applied by the trial court in passing upon a motion for a directed verdict of acquittal was

resolved when the Supreme Court denied certiorari in the case of *Curley v. United States*, 331 U. S. 837, rehearing denied 331 U. S. 869. In that case, which arose in the District of Columbia in 1946, the principal point made by the appellant Curley was that the trial court erred in refusing to direct a verdict of acquittal as to him. It was not disputed that upon a motion for a directed verdict the judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom. The Court of Appeals for the District of Columbia, Mr. Justice Wilbur K. Miller, dissenting, 160 F. (2d) 229, there held:

Appellant relies upon statements of this and other courts concerning the tests by which a trial judge must determine the proper action upon the motion. For example, in *Hammond v. United States*, 75 U. S. App. D. C. 397, 127 F. (2d) 752 (1942), this court quoted from *Isbell v. United States* as follows:

“Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him.”

It is true that the quoted statement seems to say that unless the evidence excludes the hypothesis of innocence, the judge must direct a verdict. And it also seems to say that if the evidence is such that a reasonable mind might fairly conclude either innocence or guilt, a

verdict of guilt must be reversed on appeal. But obviously neither of those translations is the law. Logically, the ultimate premise of that thesis is that if a reasonable mind might have a reasonable doubt, there is, therefore, a reasonable doubt. That is not true. Like many another rule become trite by repetition, the quoted statement is misleading and has become confused in application.

The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make. The law recognizes that the scope of a reasonable mind is broad. Its conclusion is not always a point certain, but, upon given evidence, may be one of a number of conclusions. Both innocence and guilt beyond reasonable doubt may lie fairly within the limits of reasonable conclusion from given facts. The judge's function is exhausted when he de-

termines that the evidence does or does not permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind.

The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.

That there was an abundance of substantial proof that Moncharsh engaged in a conspiracy to defraud the United States and that the trial court did not err in refusing to direct a verdict of acquittal as to him and his corporation there can be no doubt. The nature and details of such proof are set forth elsewhere herein (pp. 94-97).

D. The Scope of the Conspiracy and Its Continuity Are Clearly Established by the Evidence

Appellants' brief on pages 91 and 92 briefly argues that a continuing conspiracy was not so established. With equal brevity we answer that argument.

It is apparent from the evidence as we have summarized it in our statement that the conspiracy was

in effect previous to the date named in the indictment, namely, January 1, 1938, and it is equally certain that the pattern of fraud instituted by the defendants continued without cessation at least to December of 1944, when the S. S. *Hawaiian Shipper* was supplied with inferior and inedible eggs. The deceit practiced upon Army inspectors was an obvious matter of routine even before Pearl Harbor, as testified by both Pineda and Andrade, and also by Colonel Hand, and after that event, when WSA came into the picture as the governmental agency supplying its ships with food products, the same practice continued, and doubtless more boldly, as greater opportunities for this character of fraud appeared.

It is worthy of notice that the former Nye & Nissen employees who testified for the Government covered, in their employment, an overlapping of continuous employment during the whole period of the conspiracy up to and beyond the date of the S. S. *Hawaiian Shipper* episode, as follows:

Andrade, from the beginning to November 1940 (R. 3219).

Pineda, from the beginning to March 1943 (R. 444).

Valdez, from 1941 to 1943 (R. 4289).

McKenna, from the beginning to 1945 (R. 4300).

Matheson, from the beginning to 1943 (R. 4309).

Higuera, from the beginning to 1942 (R. 4315).

Briant, from September to December 1940 (R. 3177).

Nystrom, from January to May 1944 (R. 2450).

III. There Is No Error in the Record Relating to the Condition of Eggs Aboard Ship as Proof of Their Condition at the Time of Delivery

In their brief, pages 93 to 101, the appellants argue that the Court erred in permitting the jury to infer that the condition of eggs aboard ship was proof of the condition at the time of delivery. They particularly direct attention to the *S. S. William S. Clark* incident, the *S. S. Hawaiian Shipper* incident, the *S. S. John Muir* incident, and the testimony of Colonel Hand relating to the condition of eggs at the Presidio and at Letterman Hospital. Their claims involve such a straining of the evidence as to be entirely untenable.

In great detail, we have discussed in our statement the circumstances relating to the condition of the eggs on the *S. S. William S. Clark* (Br. 38) and the *S. S. Hawaiian Shipper* (Br. 47).

On the *S. S. William S. Clark* it was shown that the eggs, although sold and invoiced as medium AA processed eggs, were in fact old eggs that had been in storage for eight months and were not processed. The witness Brown, the ship's cook, found these eggs to be rotten and inedible in large part, which is a perfectly natural consequence of their having been kept in storage for many months without the protection of processing with oil. Again, in the incident relating to the *S. S. Hawaiian Shipper*, these eggs were invoiced as large processed procurement No. 1 eggs, which is equivalent to grade AA. Within a matter of a week or two after the ship left port they were found to be not only inedible in large part but in many cases of eggs there were whole layers missing. It should be remembered that the

eggs thus delivered to WSA ships were known by the defendants to be for use during a voyage of several months in extent, and it was further known by them that normally there would be no opportunity for complaint until this long period of time had elapsed, thus giving ample opportunity for such tenuous reasons or excuses for bad condition as their ingenuity might suggest.

It should further be remembered that in almost every one of the ships visited by the FBI agents and the Army inspectors, not only eggs inferior in quality were discovered but eggs so small as to be classified as peewees were found in large quantities but always invoiced as medium or large eggs.

Again the testimony of Colonel Hand is referred to in connection with his discovery of rotten eggs at the Presidio and at Letterman Hospital, the cases containing them bearing his own inspection stamp of two or three days previously. He testified that these eggs had been kept under ample refrigeration since their delivery at these Army posts, and the fact that they were found to be inferior upon his examination there confirms the testimony of Pineda of the deceit practiced upon the Army inspectors, including Colonel Hand, by transferring eggs from inspected and stamped cases and substituting inferior eggs after the inspector had left the plant.

So far as the *S. S. John Muir* is concerned, the details of the inspection of eggs on this ship appear at page 74 of our statement. It there appears that of the 48 cases of eggs delivered to this ship, 10 cases did not bear the USDA inspection stamp, all these bore the stamped purple "P" indicating pullet or

peewee eggs, and 3 of these were weighed and proved to be peewees, weighing on an average five pounds per case under the established weight of small eggs, and all were invoiced to the United States as medium processed AA eggs. Further, it was found on candling that they contained rots, checks, and dirties to the extent that they could be given no grade whatever.

It should further be noted that as to every ship where eggs were examined, the chill box or refrigerator where eggs were kept was in proper condition for the preservation of eggs. The statement made in appellants' brief that the chill box on the *S. S. William S. Clark* was defective is not sustained by the evidence, but, on the contrary, it definitely appears that on an occasion when the red light at the chill box appeared, to indicate a lowering of temperature, the condition was immediately corrected.

All the contentions made by appellants are based upon hypotheses that are untrue and are not sustained by the record.

Appellants complain that the Court improperly refused their instruction No. 116, appearing at page 103 of their brief. Consideration of this request in the light of the record is so misleading that to have given it would have been only to confuse the jury as to the issues of the case.

IV. The Record Contains No Instance of Prejudicial Misconduct on the Part of Government Counsel

Appellants complain that the Government prosecutor was guilty of misconduct prejudicial to the appellant Moncharsh in cross-examining him relative to

whether he had offered presents to Colonel Hand, the Army inspector. While the prosecutor did ask such questions of the witness Moncharsh (R. 4142, 4143), no objection was interposed to that line of questioning at the trial, and it is to be noted that the witness denied ever having proffered gifts to Colonel Hand. Furthermore, the defense did not at any time during the trial of the case request the Court to direct the jury to disregard this cross-examination or assign it as misconduct. In view of the fact that appellant's answers were uncontroverted by the Government, though they were favorable to the appellant, it is difficult to understand how this brief line of questioning could have in any way prejudiced the minds of the jurors. In all probability it had the contrary effect.

Appellants also vigorously contend that there was prejudicial misconduct on the part of the prosecutor when, in the course of cross-examining the witness relative to his relationship with the United States Navy, he asked the appellant Moncharsh whether he was debarred for a period of 10 years. While appellants' counsel first objected to the question and assigned it as misconduct, he later requested that any reference to the debarment by the Navy be stricken from the record and that the jury be instructed to disregard it. The Court thereupon stated, "Let it go out and the jury will disregard it" (R. 4173). On these facts there is no basis for reversal of the judgment below, since the appellant did not ask that a mistrial be declared and was sustained in his request.

that the jury be instructed to disregard the offending question. The instruction having been given by the Court, nothing more was required. See *Utley v. United States*, 115 F. (2d) 117, 119 (C. C. A. 9).

Appellants also urge that the prosecutor was guilty of misconduct in extracting three very small eggs from a small carton which bore the words "Large Grade A Eggs." We have given an extended account of this episode in our statement, *supra* (pp. 62-63), noting that the circumstance concerning the extraction of small eggs from a box bearing the label "Large Grade A Eggs" was first directed to the jury's attention by the action of the defendants' counsel, Mr. Faulkner, when he charged that Government counsel had deliberately picked a Nye & Nissen carton marked "Large Eggs" in bringing the small eggs into the courtroom so as to make some sort of impression on the jury. Government counsel stated that the Government was not bringing in the container for any purpose. The Court dealt with this situation by directing the jury to disregard the remarks of counsel on both sides, stating that the eggs were received in evidence and that the carton was to be dispensed with. The eggs were then placed in another container and exhibited to the jury (R. 3024-3028).

In view of the fact that the jury was immediately instructed to disregard the remarks of counsel, and the offending carton was immediately removed from the courtroom, there could have been no prejudice to the appellant, since it is presumed that the jury followed the Court's instructions. *Parmagini v. United States*, 42 F. (2d) 721, 724 (C. C. A. 9).

Finally, the entire alleged misconduct on the part of the prosecutor consists of but three isolated instances of short duration in a bitterly contested trial which continued for a period of almost three months. Such misconduct, if such it be, could not have affected the conclusion of the jury in this case, for the evidence overwhelmingly established the guilt of the appellants. See *Landay v. United States*, 108 F. (2d) 698, 706 (C. C. A. 6).

V. The Trial Court Properly Admitted in Evidence the So-called "S. S. Bates Letters" and the "Gartenberg Letter"

Appellants complain because Government exhibits Nos. 179, 180, 181, 182, and 183 were received in evidence. The objection is that the exhibits related to collateral matters and were not competent for the purpose of impeachment. Without undertaking to analyze the cases cited by appellants, we may say that they have no application here, for neither the exhibits nor the cross-examination concerning them related to collateral matters. The examination by Government counsel was in direct cross of testimony elicited on direct examination, and related to an issue thus raised by the defense. The exhibits themselves, for which a complete foundation was laid, were so far inconsistent with the testimony of appellant Moncharsh as to reflect upon his credibility as a witness, and were thus competent for the purpose of impeachment. A brief examination of the record will demonstrate the correctness of this contention.

The appellant Moncharsh was asked on direct if he had received or if there had come to his atten-

tion any complaints from steamship companies with respect to Nye & Nissen deliveries. Defense counsel indeed undertook to limit the testimony on direct to the specific period from April 24, 1944, to May 13th of the same year, perhaps on the hypothesis that the cross-examination would be thus limited to the same period. But the witness said he did not "ever remember a complaint from a steamship company with the exception of the William S. Clark," and, notwithstanding the efforts of defense counsel to explain and interpret the meaning of the answer, the witness admitted on cross-examination that the answer encompassed *any* complaint relating to the delivery of eggs or other produce to ships of the WSA.

This line of testimony on direct examination was obviously intended to demonstrate the good faith of appellant Moncharsh, and to show his lack of knowledge of the practices charged in the indictment. If believed it would, at least, have that effect, and it is therefore doubtful if the cross-examination could properly have been restricted to the narrow limits within which defense counsel sought to confine it even had the witness limited his answer to that period (April 24 to May 13). We do not deem it necessary, however, to argue this phase of the matter, for reference to the exhibits themselves will show that the final letter of this series was dated on April 24, 1944, and thus brought the whole transaction within the narrow limits so meticulously fixed by defense counsel.

For all of these reasons the incident was a proper

subject for full and complete cross-examination and the documents were competent for the purpose of impeachment. The following excerpt from a recent decision of this Court in *Cossack v. United States*, 63 F. (2d) 511, 516, is, we submit, the law of this case on the point at issue:

It is elementary, of course, that on cross-examination a witness may be asked whether he did not make certain statements inconsistent with his present testimony. *Heard v. United States* (C.C. A. 8) 255 F. 829, 832, and *United States v. Phelan* (D. C.) 252 F. 891, 892.

As was said in the *Heard* case, *supra*: “A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error. It is only after the right has been substantially and fairly exercised that the allowance of cross-examination becomes discretionary [*Many cases cited*].” [Italics supplied.]

As to the Gartenberg letter, the objection is equally without merit. Admissibility of the letter did not depend upon proof of mailing and the other conditions discussed in appellants’ brief, for there was other and direct evidence that the witness (Moncharsh) had received it. Gartenberg testified that on the day after the letter was written, Moncharsh called him by telephone and remonstrated with him for having written it (R. 4320).

VI. The Court Was Correct in Denying Appellants' Motion to Strike the Testimony of the Witness Pineda

Appellants' motion for exclusion of evidence requested that the trial court strike practically all of the testimony adduced by the witness Pineda. In all, the motion set forth 24 matters concerning which Pineda testified and as to which the Court was requested to strike all of the testimony. Appellants have not attempted to deal separately with each of these 24 matters, nor shall we. They have contented themselves with arguing that an examination of Pineda's testimony in its entirety will manifest that it is permeated with prejudicial hearsay statements and irrelevant and immaterial testimony. Close scrutiny of the testimony of Pineda will reveal that such is not the case. The witness testified with respect to matters which he had observed and frauds in which he had participated. He placed one or more of the defendants at the scene during the commission of the acts about which he was testifying.

The testimony of the witness Pineda has been heretofore summarized in our statement, *supra* (pp. 7-21). It will be noted from that summary and from an examination of the testimony itself that the witness' statements were highly relevant and material, since they described instances in which Government inspectors were deceived as to the grade, quality, and weight of eggs and butter which required Government inspection. The witness was also able to place the defendants Berman, Goddard, Menges, and Moncharsh as participants in the actual deception of the Government inspectors.

In every respect the testimony of the witness Pineda was legally competent proof of the highest order, that of a participant and eyewitness, and as such was properly for the jury's consideration in determining the issues in this case.

VII. The Court Below Did Not Err in Failing to Give Instructions Requested by Appellants

Appellants assign as error the trial court's failure to include in its charge to the jury (R. 4356-4382) eight requested instructions.⁷ The grounds of the exceptions to the charge as given do not appear in the record and are not specifically defined in appellants' brief. This Court heretofore has refused to review such alleged errors where, as here, the bases of the exceptions taken were of general application or were not definitely set forth. *Du Vall v. United States*, 82 F. (2d) 382, 383, 384 (C. C. A. 9, 1936), cert. den. 298 U. S. 667; *Goldstein v. United States*, 73 F. (2d) 804, 806, 807 (C. C. A. 9, 1934); *Bigliere v. United States*, 35 F. (2d) 847, 848 (C. C. A. 9, 1929).

The principles involved in six of the instructions requested were fully covered by the charge given.⁸ Even though these instructions were proper in form and substance, it was not error for the court to dis-

⁷ Instructions No. 55 (R. 107), No. 58 (R. 110), No. 63 (R. 112), No. 78 (R. 119), No. 92 (R. 127), No. 119 (R. 143), No. 120 (R. 143), and No. 121 (R. 145).

⁸ Instruction No. 55 is covered in the charge at R. 4357-4358, 4360, 4366-4367, and 4369; Instruction No. 58 is covered in the charge at R. 4370; Instruction No. 63 is covered in the charge at R. 4376-4377; Instruction No. 78 is covered in the charge at R. 4376-4377; Instruction No. 92 is covered in the charge at R. 4368; and Instruction No. 120 is covered in the charge at R. 4366-4368.

regard them and charge the jury in its own language as long as the essential aspects of the case were covered.

In *Thiede v. Utah*, 159 U. S. 510, 520 (1895), the Supreme Court, in affirming a conviction of murder, made the following comment with regard to the trial court's refusal to give instructions requested:

An examination of the twenty-two instructions show that they are mainly directed to the matters of reasonable doubt, presumptions of innocence, circumstantial testimony, and confessions, in respect to which the court, while not using the language of counsel, substantially expressed the same propositions in its charge. Of course, it was under no obligations to use the precise language adopted by counsel, and if it fully covered the ground indicated by the requests it is sufficient.

Similarly, in *United States v. Trenton Potteries Co.*, 273 U. S. 392, 396 (1926), the Supreme Court said on this subject:

If the charge itself was correctly given and adequately covered the various aspects of the case, the refusal to charge in another correct form * * * was not error, * * *

To the same effect is *Sugarman v. United States*, 249 U. S. 182 (1918).

Instruction No. 119 (R. 143) was refused and was not specifically covered in the charge, although the court adequately charged the jury as to matters which should be disregarded (R. 4377-4379). By this requested instruction it was sought to caution the jury that no inferences should be drawn from the fact

that defense counsel from time to time during the trial interposed objections to evidence. Such an instruction was not required under the issues and evidence of this case. The instruction is not supported by the authority cited by appellants. It is not error to refuse to give instructions which are not strictly applicable to the case under the evidence. *Battle v. United States*, 209 U. S. 36 (1908); *Taylor v. United States*, 142 F. (2d) 808 (C. C. A. 9, 1944), cert. den. 323 U. S. 723.

Instruction No. 121 involves the charge that a completed act which was not an offense at the time of its commission cannot become such by any subsequent act of the accused. Under the authorities above cited, it was not error to refuse this instruction. The court adequately covered in its charge the elements of the offense.

The charge to the jury, covering 26 pages of the printed record, fairly and fully covers every essential aspect of this case. This Court has laid down the rule in cases such as this, where evidence of guilt is convincing, that errors in the charge to the jury which do not affect the substantial rights of the accused are not ground for reversal of conviction. *Roubay v. United States*, 115 F. (2d) 49 (C. C. A. 9, 1940); *Wilton v. United States*, 156 F. (2d) 433 (C. C. A. 9, 1946); *Guy v. United States*, 107 F. (2d) 288 (App. D. C., 1939), cert den. 308 U. S. 618.

VIII. The Trial Court Was Correct in Admitting in Evidence the Testimony of Josephine I. Briant

The gist of the conspiracy was the circumvention of the Government's system of inspection of "dairy

products, particularly eggs, being purchased by various Government agencies from appellant corporation. The appellant corporation was thus enabled to hoodwink the Government agencies into accepting delivery of inferior products in the belief that they were receiving the superior products for which they were billed and for which the Government was paying.

One of the means by which the appellants practiced these deceits was the tactic of substituting inferior grade eggs for those already examined and approved by Government inspectors.

The testimony of the witness Josephine I. Briant is particularly pertinent in this respect, since it relates to a specific instance in which inferior grade eggs were substituted for U. S. Specials (the highest grade) in cases which had already been inspected and approved by the representative of the Army Veterinary Corps.

Appellants make much of the argument that the witness did not see the Government order for the eggs in question and was unable to state positively that the substituted eggs were in fact delivered to the Government or one of its agencies. This argument misses the mark, since the evidence conclusively shows a fraud practiced upon one of the governmental functions, namely, the inspection of eggs. Mrs. Briant's testimony shows positively that inferior eggs were substituted in cases previously examined by a lieutenant of the Veterinary Corps of the Army and bearing the Veterinary Corps stamp. This in itself is a fraud upon one of the operations of the Government, namely, the inspection of eggs by its representative,

and it is also one of the important steps in carrying out the conspiracy.

Furthermore, the evidence of Mrs. Briant is corroborative of that of other witnesses which the Government had previously produced to prove the existence of the conspiracy. While the evidence may have been detrimental to the appellants in that it tended to substantiate testimony of previous witnesses, it was clearly admissible as showing one instance and one means by which fraud was practiced upon a Government agent and the operations of a governmental agency by the appellants, and thus was not improperly prejudicial.

IX. The Trial Court Properly Admitted Evidence of Other Offenses to Prove Intent, Motive, and Guilty Knowledge and Correctly Charged the Jury on That Subject

The charge of the Court in relation to transactions similar to those charged in the substantive counts of the indictment, was assigned as error. The charge is as follows:

Testimony has been introduced by the prosecution which it is claimed tends to show the commission of other acts or offenses by the defendant similar to that charged in the indictment. I charge you that this evidence was admitted for the sole purpose of proving guilty intent, motive, or guilty knowledge of the defendant, and that it can be considered by you for no other purpose (R. 4377).

This charge related to the substantive counts alone for all of the evidence so adduced was unquestionably relevant to the charge of conspiracy. The transactions outlined in the substantive counts were, them-

selves, overt acts, and proof of them was competent to prove the conspiracy, but not all the overt acts were made the basis of substantive counts. As pointed out in appellants' brief (pp. 127, 128) Government counsel, at the conclusion of the Government's case and again at the conclusion of all the evidence, moved the Court that all evidence, documentary and oral, relating to the delivery of eggs on ships other than those mentioned in the substantive counts 2 to 7 (excepting only the evidence relating to the *S. S. Hawaiian Shipper*) be made applicable to the said substantive counts as touching the question of intent. The Court granted the motion at the conclusion of all the evidence, and charged the jury accordingly.

The real question here presented is whether, in the background and setting of this conspiracy, the charges in the substantive counts, based upon certain of the overt acts, can, for the purpose of showing knowledge and intent, be supported by evidence of other overt acts of a similar character, wholly relevant to the conspiracy charge but not included in the indictment as substantive counts.

It is of course the general rule that evidence of other offenses is not admissible to prove the crime charged, but there are a number of exceptions to this rule. Indeed it has been said that it is "difficult to determine whether the rule itself or the numerous exceptions thereto were the more extensive." *Johnson v. United States*, 22 F. (2d) 1 (C. C. A. 9). It is not open to question that similar transactions not too remote in time are admissible in certain types of

cases and for a variety of reasons. These reasons have been admirably summed up in *Martin v. United States*, 127 F. (2d) 865 (App. D. C.), from which we quote:

Generally speaking, evidence of other crimes is competent to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

It must be borne in mind that all of this evidence was competent to prove the conspiracy charge, and would have gone to the jury in any event. As touching the substantive counts it was likewise submitted to the jury for whatever its probative value may have been to show the intent of the various defendants, including Moncharsh. On the admissibility of such evidence to show intent this Court has recognized and applied the exception to the general rule. [A detailed analysis of the principles involved appears in *Tedesco v. United States*, 118 F. (2d) 737 (C. C. A. 9), at page 740, as follows:

The general rule, however, is modified by a well-recognized exception thereto, which has the sanction of the best law writers, both judicial and academic. That exception may be stated as follows: “* * * where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in

civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.” *Wood v. United States*, 41 U. S. 342, 360, 16 Pet. 342, 360, 10 L. Ed. 987, per Mr. Justice Story. This exception has been applied with uniformity down through the years. See *Neff v. United States*, 8 Cir., 105 F. 2d 688, 691; *Baish v. United States*, 10 Cir., 90 F. 2d 988, 990; *Breedin v. United States*, 4 Cir., 73 F. 2d 778, 780; *Hood v. United States*, 10 Cir., 59 F. 2d 153, 154; *Butler v. United States*, 10 Cir., 53 F. 2d 800, 805; *Hatem v. United States*, 4 Cir., 42 F. 2d 40, 41; *Kinser v. United States*, 8 Cir., 231 F. 856, 860; *Schultz v. United States*, 8 Cir., 200 F. 234, 237; *Colt v. United States*, 8 Cir., 190 F. 305, 307; *Bottomley v. United States*, 3 Fed. Cas. 968, 971, No. 1,688. The exception has also been stated negatively—“Relevant and competent evidence of guilt is not rendered inadmissible because it also tends to prove that the defendant committed another offense.” *Crapo v. United States*, 10 Cir., 100 F. 2d 996, 1001. See also *Minner v. United States*, 10 Cir., 57 F. 2d 506, 510. In addition, at least two of the authorities offered by the appellant recognize and discuss this exception. *Coulston v. United States*, 10 Cir., 51 F. 2d 178, 180, 181; *Paris v. United States*, 8 Cir., 260 F. 529, 531. We take the following apt quotation from Jones Commentaries on Evidence, vol. 2, § 624, pp. 1160–1162: “Although the rule [that proof of a distinct, independent offense is inadmissible] is stringent, in criminal cases the conduct of the prisoner on other occasions is

sometimes relevant, where such conduct has no other connection with the charge under inquiry than it tends to throw light on what were his motives and intentions in doing the act complained of. The intention with which a particular act is done often constitutes the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular transaction concerning which the accused is upon trial. For the purpose, therefore, of proving intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from like mental condition." See also Wigmore on Evidence, 2d Ed., vol. 1, §§ 300, 302, pp. 608, 611-616; Wigmore's Principles of Judicial Proof, 2d Ed., § 116, pp. 224-228; Atwell, Federal Criminal Law, § 26d, p. 166; 20 Am. Jur. §§ 309, 313, pp. 287, 293-296; 62 L. R. A. 193, 214, note.

The exception, i. e., to prove intent, finds its most frequent application in cases of fraud. *Simpkins v. United States*, 78 F. (2d) 594 (C. C. A. 4); *Tincher v. United States*, 11 F. (2d) 18 (C. C. A. 4) cert. denied 271 U. S. 664; *Weiss v. United States*, 122 F. (2d) 675 (C. C. A. 5), cert. denied 314 U. S. 773. The following excerpt from the *Weiss* decision (p. 682) is a lucid exposition of the principles involved:

The general rule is that evidence of another crime unconnected with the one on trial is inadmissible, but this rule is subject to a number of exceptions, the first of which is that evidence of other offenses by the accused is admissible

to show his criminal intent as to the offense charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged. Another exception is where the evidence of a separate crime tends to explain, illustrate, or characterize the act charged when such act is capable of more than one construction. Another is to rebut a claim of mistake or inadvertence. An exception also applies where the crime charged is one of a series of swindles or other crimes involving a fraudulent intent, or where the crime charged is part of a plan or system of criminal action. *It is clearly admissible in prosecutions for obtaining money by false pretenses.* The length of time over which an inquiry as to other offenses may extend is within the sound discretion of the trial court. [Italics supplied.]

The Court goes on to observe that some of these exceptions are more apparent than real. Thus it was stated, quoting Greenleaf, that "in some cases, however, evidence has been received of facts which happened before or after the principal transaction and which had no direct or apparent connection with it; and therefore might seem, at first view, to constitute an exception to this rule. But those will be found to have been cases, in which the *knowledge* or *intent* of the party was a material fact, on which the evidence, apparently collateral, and foreign to the main subject, had a direct bearing and was therefore admitted. * * * Cases of this sort, therefore, instead of being exceptions to the rule, fall strictly within it."

Further analyzing the law the Court quoted from Reynolds on Evidence, 4th Ed., p. 13:

Thus, where the question is whether an act done by A. was committed with a fraudulent intent, his fraudulent conduct to third parties in similar transactions about the same time is a relevant fact to show his animus (*McAleer v. Horsey*, 35 Md. 439, 461; *Bottomley v. United States*, 1 Story 135, 3 Fed. Cas. [page] 968 [No. 1,688]; *Castle v. Bullard*, 23 How. 172 [16 L. Ed. 424]; *Lincoln v. Claflin*, 7 Wall. 132 [19 L. Ed. 1061]; *Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591 [6 S. Ct. 877, 29 L. Ed. 997]); and so, also, where there is a question as to whether an act was accidental or intentional, the fact that such an act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is a relevant fact to show intention on his part. *Id.*

It is observed that one of the so-called exceptions to the general rule is that evidence of similar transactions is admissible to show a general scheme, or a common plan or a course of conduct. *United States v. Gen'l Motors*, 121 F. (2d) 376 (C. C. A. 7); *Boehm v. United States*, 123 F. (2d) 791 (C. C. A. 8); *American Medical Ass'n v. United States*, 130 F. (2d) 233 (App. D. C.); *McDonald v. United States*, 133 F. (2d) 23 (App. D. C.); *Egan v. United States*, 137 F. (2d) 369 (C. C. A. 8); *Heike v. United States*, 227 U. S. 131. In this case all of these things were shown to exist. They were part and parcel of the conspiracy charged in count 1, and all the evidence objected to in this assignment was directly competent and relevant under

that count, for a general scheme or a common plan or a course of conduct, if engaged in by two or more parties in a criminal endeavor, is the essence of conspiracy. The transactions here involved in the substantive counts were themselves illustrative of the general scheme, the common plan, and the course of conduct, and constituted specific overt acts in the conspiracy. If there had been no charge of conspiracy and the case had been tried on the substantive counts alone, the evidence of these other similar transactions, as well as the evidence connecting Moncharsh with the general scheme would have been admissible under at least four (1, 2, 3, and 4) of the apparent exceptions listed in *Martin v. United States*, *supra*. See *United States v. Kelley*, 105 F. (2d) 917.

Appellant Moncharsh complains that there was no evidence connecting him specifically with the transactions set forth in the substantive counts. It is pointed out, however, that there was an abundance of evidence from which the jury could and did find that a general scheme, or a common plan, i. e. a conspiracy, existed and that Moncharsh was a party to it, and under such circumstances it was unnecessary to show that he participated personally in these substantive transactions. A similar contention was made in *United States v. Uram*, 148 F. (2d) 187 (C. C. A. 2), and the Court said, at page 190:

Sohmer's contention that there is no proof of his connection with the alleged crime—that he was present merely when the Campbells

signed the applications in blank—has only plausibility for its support. A reading of the record removes any apprehension one might otherwise have as to his guilty participation in the commission of the fraud. *Hyde v. United States*, 225 U. S. 347, 32 S. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. He was the instigator of the whole transaction, was present at its inception, a real participant therein, and a beneficiary thereof. So the jury could have well found, and did find from all the evidence.

Finally, the exact point here presented was recently discussed by the Supreme Court in *Pinkerton v. United States*, *supra*, which is quoted at length under Point II B of this brief at pages 98, 99 and 100. The principles discussed in that case are identical with those here involved, and we again refer to the above quotation.

To support the Government's contention, authorities could be multiplied indefinitely, for as this Court said in the *Johnson* case, *supra*, it is difficult to determine whether the rule itself or the exceptions thereto are the more extensive. We have therefore limited ourselves to the citation of those cases which, we believe, will be most helpful in passing upon the issues, and we accordingly submit that the Court's action in granting the motion (quoted on page 128 of appellants' brief) was correct, and that there was no error in the charge to the jury.

CONCLUSION

The trial of this case consumed more than eleven weeks, the printed record is in eleven volumes. Able and astute counsel for the defendants were ever alert to protect their interests, and the distinguished jurist who presided was just as alert to preserve for the defendants every right to which the law entitled them. They were convicted by the jury's verdict by evidence so overwhelming in its convincing force and under a record so clearly free from prejudicial error that the trial court denied them bail on appeal.

With this long record, if any error appears, we believe the provisions of Section 269 of the Judicial Code, as amended (28 U. S. C. 391) are particularly applicable, as follows:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.⁹

In the recent case of *Kotteakos v. United States*, 328 U. S. 750, the Supreme Court presents a comprehensive discussion of the effect of and the proper consideration to be given to that section. It is pointed out that the salutary policy embodied in the section was adopted by Congress after long agitation under distinguished professional sponsorship in order to de-

⁹ See Rule 52 (a) of the Rules of Criminal Procedure for a restatement of 28 U. S. C. 391.

feat and correct the widespread conviction that criminal trial had become a game for sowing reversible error in the record, only to have repeated the same matching of wits when a new trial had thus been obtained. Beginning on page 759 of the report, the Court says:

In the broad attack on this system great legal names were mobilized, among them Taft, Wigmore, Pound and Hadley, to mention only four. The general object was simple. To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record.

The task was too big, too various in detail, for particularized treatment. Cf. *Bruno v. United States*, 308 U. S. 287, 293. The effort at revision therefore took the form of the essentially simple command of § 269. It comes down on its face to a very plain admonition: "Do not be technical, where technicality does not really hurt the party whose rights in the trial and in its outcome the technicality affects." It is also important to note that the purpose of the bill in its final form was stated authoritatively to be "to cast upon the party seeking a new trial the burden of showing that any technical errors that he may complain of have

affected his substantial rights, otherwise they are to be disregarded.”

On the record the appellants were properly convicted, and we respectfully submit that the judgment should be affirmed.

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APPENDIX

TITLE 18, SECTION 80

§ 80. (Criminal Code, section 35 (A).) Presenting false claims. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

TITLE 18, SECTION 88

§ 88. (Criminal Code, section 37.) Conspiring to commit offense against United States. If two or more persons conspire either to commit any offense against

the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

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United States Circuit Court of Appeals
For the Ninth Circuit

NYE & NISSEN (a corporation), and

ABRAHAM MONCHARSH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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FILED
JUL 20 1948

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CLERK

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*To the Honorable Francis A. Garrecht, Presiding Judge,
and to the Honorable Associate Judges of the United
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A decision was entered in the above entitled cause on June 21, 1948, affirming the judgment of the lower Court as to both Appellants. We believe that this Honorable Court has erred in its decision on several important issues. These erroneous rulings are as follows:

1. That the conviction of Appellant Moncharsh on the substantive counts, without evidence of his participation therein, or his aiding and abetting thereof, can be sustained by the application of the theory of the *Pinkerton* case even though the trial Judge did not submit the case to the jury on that theory, which requires findings by the jury of vital issues of fact before it may be invoked.

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1. That the conviction of Appellant Moncharsh on the substantive counts, without evidence of his participation therein, or his aiding and abetting thereof, can be sustained by the application of the theory of the *Pinkerton* case even though the trial Judge did not submit the case to the jury on that theory, which requires findings by the jury of vital issues of fact before it may be invoked.

2. That the admission of evidence of other offenses similar to the substantive offenses and permitting the jury to consider them as evidence tending to show intent to commit the substantive offenses was not error as to Appellant Moncharsh, who had no connection directly or indirectly with the substantive offenses, because the *Pinkerton* case applies to hold him responsible for their commission.

3. That the conspiracy as proven was a single continuing one.

4. That the conspiracy count was not duplicitous.

5. That the introduction in evidence of letters relating to eggs aboard the S.S. Bates was proper because they tended to show knowledge on the part of Moncharsh of fraudulent practices engaged in by Company employees.

6. That part of the Pineda testimony being admissible, a motion to strike it all was properly denied.

ARGUMENT.

POINT ONE.

The learned trial Judge submitted the issue of guilt or innocence on the substantive counts to the jury with instructions requiring them to find evidence of either direct participation or aiding and abetting, before a conviction on these counts could be returned. However, there was no evidence from which the jury could draw an inference that Moncharsh participated in, directed, knew of, aided, abetted, commanded, induced or procured the filing of any false vouchers which were the basis of the substantive

counts in this case. Nevertheless, his conviction for these crimes is now sustained on the sole ground that the case of *Pinkerton v. United States*, 328 U.S. 640 (1946), compels the ruling. Thus, the theory upon which this Court affirms the verdict of guilt on these counts is different from that advanced by the prosecution in the trial Court and, as we have observed, wholly different from that upon which the Court submitted the case to the jury. This theory was introduced for the first time by the prosecution on appeal. By resting the conviction of Moncharsh on these counts wholly on the *Pinkerton* doctrine, this Court very evidently agrees that the evidence is deficient with respect to direct participation or aiding and abetting. Appellant, prosecution and Court alike, are apparently in accord on that issue.

Yet, there is a basic distinction between the *Pinkerton* case and this one. It lies in this: that in the *Pinkerton* case the trial Court submitted the issue of innocence or guilt of the defendants on the substantive counts to the jury with the specific instruction that certain findings of fact would have to be made before the determination was arrived at. The Supreme Court, in affirming the convictions in the *Pinkerton* case, pointedly noted that charge (328 U.S. 640, 645-646, footnote 6):

“6. The trial court charged: ‘* * * after you gentlemen have considered all the evidence in this case, if you are satisfied from the evidence beyond a reasonable doubt that at the time these particular substantive offenses were committed, that is, the offenses charged in the first ten counts of this indictment if you are satisfied from the evidence beyond a reasonable doubt that the two defendants were in an

unlawful conspiracy, as I have heretofore defined unlawful conspiracy to you, then you would have a right, if you found that to be true to your satisfaction beyond a reasonable doubt, to convict each of these defendants on all these substantive counts, provided the acts referred to in the substantive counts were acts in furtherance of the unlawful conspiracy or object of the unlawful conspiracy, which you have found from the evidence existed.’ Daniel was not indicted as an aider or abettor (see Criminal Code, § 332, 18 U.S.C. 550), nor was his case submitted to the jury on that theory.’”

We observe, therefore, that in the *Pinkerton* case “the question was submitted to the jury on the theory that such petitioner could be found guilty of the substantive offenses, *if it was found* at the time these offenses were committed petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it.” (328 U.S. 640, 645; italics ours.)

The *Pinkerton* case does not create a legal conclusion, as this Court may believe, that substantive offenses committed by a member of a conspiracy are the acts of all members of that conspiracy. Before the vicarious liability for the acts of another can be imposed upon a so-called co-conspirator, the *Pinkerton* case very evidently holds that the jury must find that (1) the conspiracy was in existence at the time the substantive offenses were committed; and (2) the substantive offenses were acts in furtherance of the conspiracy or the object of the conspiracy. Thus, the Supreme Court was careful to point out that:

“A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.” (328 U.S. 640, 647.)

This statement serves to correct the erroneous concept that each member of a conspiracy is liable as an aider and abettor for the acts of all of its members. The Supreme Court recognizes the necessity for specific fact finding by the jury before the liability of one person can be transferred to another. Further, in *Johnson v. United States*, 62 F. 2d 32, cited by the Court in further support of its ruling, the issue of the existence of the conspiracy at the time that the substantive offenses were committed was submitted to the jury and found in the affirmative. That is a basic distinction between that case and this one, apart from others suggested by a comparison of the facts of both cases.

The duty of finding these facts is wholly within the province of the jury, with proper instruction of the law as it exists from the trial Court. Concededly, it is not the function of either the trial Court or the Appellate Court.

In this case, the jury was not requested to make the findings of fact which are the necessary grounds upon which the *Pinkerton* doctrine must be rested. What was lacking below, however, has been quite apparently supplied here in order to bring the issue within the *Pinkerton* rule. Thus, this Court has substituted its own findings,

based on the record submitted on appeal, for that of the jury below, namely, that the conspiracy of which Appellant Moncharsh was a member, was in effect at the time the substantive acts were committed and that these acts were in furtherance of that conspiracy.

We respectfully suggest, however, that the issue is not whether guilt can be so spelt out of this record by this Court, but rather is whether it was found by the jury below on proper instruction from the Court. In *Bollenbach v. United States*, 326 U.S. 607, 614, the Supreme Court in criticizing such practice stated:

“* * * In view of the Government’s insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.”

And the Court further stated the proposition in the following language:

“* * * In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.”

The question is not, as we might believe from the Court’s opinion, “that unless there is substantial evidence to support the verdict under the instructions which were given,

the verdict cannot be sustained on the ground that the evidence was sufficient under a theory as to which the jury was uninstructed.”

Rather, the question is whether the verdict of guilt as to Appellant Moncharsh on the substantive counts on which there was no evidence of participation of aiding or abetting can be affirmed on a theory of law upon which the issue was not submitted to the jury and which theory of law requires specific findings of fact before it can be invoked. We believe that a consideration of this question compels a finding in the negative. The error created by the affirmance of the conviction of Moncharsh on the substantive counts on the doctrine of the *Pinkerton* case is not merely a technical one. To so hold is to deprive him of his constitutional right to a trial by jury in accordance with the law of the land. *Bollenbach v. United States*, 326 U.S. 607 (1946); *Kraus & Bros. v. United States*, 327 U.S. 614 (1946); *Bihn v. United States*, 328 U.S. 633 (1946); *Kotteakos v. United States*, 328 U.S. 750 (1946).

POINT TWO.

The basis of this Court's ruling that there was no error in permitting the jury to consider other offenses similar to the substantive offenses for the purpose of determining the intent with which Moncharsh committed those substantive crimes is also wholly rested upon the *Pinkerton* case. Thus, we find in the Court's opinion the following language:

“ * * * This contention ignores the evidence indicating that Moncharsh participated in a conspiracy, in fur-

therance of which the acts charged in the substantive counts and the prior offenses were committed. This evidence establishes Moncharsh as an instigator of such acts and offenses, which thereby became admissible against him in determining his guilt under the substantive counts. *Pinkerton v. United States*, 328 U.S. 640.”

We feel that the non-application of the doctrine of the *Pinkerton* case to this one on the substantive counts has been cogently demonstrated in our foregoing argument under Point One. It is apparent that the original error thus created has produced the error in this holding, namely that Appellant Moncharsh, as a co-conspirator, is responsible for the offenses of filing false claims in 1944 as an aider or abettor because the record justifies that conclusion on the part of this Court.

Since this point has been fully treated in our main brief, we feel it unnecessary to again point out the lack of any connection between Appellant Moncharsh and most of the so-called other offenses or to reiterate the correct rule of law on the point.

POINT THREE.

The conspiracy was not a continuing one. We wish to avoid the repetition of the lengthy and controverted facts of this case. We note that this Court in its opinion has observed that the evidence with reference to Appellant Moncharsh, related chiefly to the period prior to 1943. Moreover, this Court recognizes the fact that if a variance existed between the charged conspiracy and the proof,

it would most likely be a material one. It is difficult to understand, however, how isolated instances of alleged impeding of the inspection service of the Army and Navy for the years 1939 to 1942 had any connection with the shipment of eggs to certain Merchant vessels operated on behalf of War Shipping Administration in the year 1944. It would seem in order to justify the conclusion that "all misconduct of defendants was germane to one consistent and persistent course of wrongdoing", there must be some relation in time, place, persons and circumstances to the alleged course of wrongdoing. As we have pointed out in brief and argument, that relationship is lacking here.

The danger inherent in an indictment of this nature, which endeavors to charge a single conspiracy persisting throughout a period of some eight years on the part of persons who were engaged in a *per se* legitimate business is that every effort may be made to broaden the interpretation of the evidence rather than to narrow it. Yet, we feel, that the conclusion which we urged upon this Court, that there was in fact two conspiracies proved, whereas one was alleged does not require an artificial or narrow view of the evidence. Careful analysis reveals that all evidence from which an inference of impairing the inspection system of the Government could be drawn, which was the gist of the conspiracy, did not go beyond the year 1942; that all evidence tending to connect Appellant Moncharsh with these activities did not go beyond 1942; that in the year 1943, one solitary complaint concerning 40 cases of eggs, which complaint was amicably adjusted between vendor and vendee, is the only evidence from which any inference of fraudulent activity could be

drawn and certainly none as to Appellant Moncharsh; that in 1944 all evidence related specifically to War Shipping Administration ships, involving deficient deliveries, with no impeding of the inspection system and no evidence connecting Appellant Moncharsh with them.

The time during which the fraud was allegedly committed upon War Shipping Administration was 1944; the time the alleged fraud upon the Army and Navy was 1939 to 1942. The type of alleged fraud upon War Shipping Administration was delivery of inferior products without reference to impeding or impairing the inspection system; the type of alleged fraud upon Army and Navy was impeding and impairing their inspection services only. The persons involved with respect to War Shipping Administration were Berman and Goddard; with respect to Army and Navy, Moncharsh, Menges, Berman and Goddard. At the time that the frauds were supposedly committed upon War Shipping Administration there were none committed upon Army and Navy; when supposedly committed upon Army and Navy there were none upon War Shipping Administration. These facts tend to show the variance in the proof, namely, that two conspiracies were shown.

POINT FOUR.

The conspiracy count, we submit, was duplicitous in that it alleged two separate conspiracies. The War Shipping Administration, as we have previously noted, did not come into existence until some five years after the unlawful agreement was alleged to have been formed.

The case of *Rose v. United States*, 149 F.2d 755, is suggested by the Court as a case that contains a similar situation. However, in that case, a conspiracy was alleged to have begun about December 12, 1941, and the Second War Powers Act came into existence some three and one-half months later. The conspiracy was to commit offenses against the United States, viz., offenses condemned by specific regulations which were immediately superseded or incorporated in the Second War Powers Act. In the instant case, however, the unlawful agreement could have no such direct relationship to the War Shipping Administration in point of time. Nor was the character of the unlawful agreement similar to that described in the *Rose* case.

We submit, that a reading of Count I of the indictment leads to a reasonable conclusion that the Count does not charge one conspiracy with several objects, but rather two separate and distinct conspiracies.

POINT FIVE.

As an additional point requiring reconsideration of this Court's judgment, we respectfully contend that there is error in holding that the letters relating to eggs aboard the S.S. Bates were duly admitted in evidence. This Court has held in its opinion that these letters tended to show knowledge on the part of Moncharsh of fraudulent practices carried out by his employees.

This Court sums up the matter as follows:

“* * * The letters tended to prove that Moncharsh knew of the practices engaged in by Nye & Nissen's

employees, and therefore were relevant to the question of fraudulent intent. *Rice v. United States* (CCA 10), 149 F.2d 601, 603, and cases cited. It follows that they were properly admitted to contradict the statements made by Moncharsh as a witness.”

Thus it appears clearly from the language of the Court that the admission of these letters has been upheld by it on the theory that they tended to show knowledge of fraudulent practices “engaged in by Nye & Nissen employees”. We respectfully and firmly contend that the letters prove no such thing. At the most, they show that after these eggs had been in the hands of the consignee for a period of time varying from three weeks to two and one-half months, some of them were found in inedible condition aboard the S.S. Bates—some 30 cases. The letters show that a claim for refund was made and a partial refund voluntarily made by the Company at the direction of Moncharsh. We are utterly at a loss to understand how such letters and the conduct of Moncharsh in reference thereto could be either direct proof of or facts from which fraud could be implied. That their admission was mischievous and prejudicial to Appellants we believe to be obvious. For evidently the jury took the same view of the evidence as that expressed by the Court in its opinion. With great respect, we urge a reconsideration of this point, especially because of the emphasis placed upon this evidence by the prosecution in presenting its cause to the jury. The further vice in the introduction of such evidence is the opening up of multiple avenues of inquiry—almost an endless procedure with the conduct of the defendant corporation and the other defendants

being examined over a period of some eight years. If this evidence was relevant at all, it belonged in the prosecution's case in chief and being interposed in the closing moments of the case provided further emphasis and provided additional prejudice.

The authority of *Rice v. United States*, 149 F.2d 602, does hold that a letter to the accused or brought to his attention, calling attention to misrepresentations or wrongful practices employed by salesmen or others connected with the organization or enterprises is admissible in evidence for the purpose of bringing home to him knowledge of such misrepresentations or practices.

We do not contend that the law is otherwise than stated in this authority. But the aforementioned case is not an authority for the admission of letters that do not show or tend to show fraud. To draw inferences of fraudulent conduct from such facts is to grossly prejudice the rights of a defendant.

POINT SIX.

An additional point requiring reconsideration of this Court's judgment is in respect to that phase of its opinion relating to the Pineda testimony. The Court held:

“We have, nevertheless, examined Pineda's testimony and are of the opinion that much of it was obviously competent, relevant and material. Part of it being admissible, a motion to strike it all was properly denied.”

Every part of the Pineda testimony, the substance of which is given in the brief commencing at page 26 and

ending at page 35, together with all of the testimony relating to the butter-cutting incident, is clearly inadmissible. It is the fact and is clearly implicit in the Court's decision that a considerable quantity of the 622 pages of Pineda's testimony is inadmissible.

The basis of the Court's decision is not borne out by the record. The Court below did not rule on a motion to strike *all* testimony of Pineda but, on the contrary, ruled on a motion to strike specific parts of the testimony of Pineda, including each of the matters analyzed in the brief. Defendants moved to strike 24 separate phases of the Pineda testimony and the motion is precise that it relates to each separate portion:

“Said motion is made as to the evidence covered in each paragraph and subdivision above and each fact covered in each of the above numbered paragraphs on all and each of the following grounds as though said grounds had been specifically repeated as to each paragraph and each fact, transaction or episode covered in each paragraph:”

It is respectfully urged that upon reconsideration of this case all of the testimony analyzed in the brief for appellants is clearly inadmissible and having been admitted over the objection of the defendant, calls for the reversal of the case. We repeat: “It is not an overstatement to declare that the Pineda testimony is the most wretched and legally incompetent proof to be found in any record of any case in this Circuit. The Court below could not follow or comprehend its relevancy yet permitted it to stand for what it was worth.” A conviction based upon venom breathed into a record by incompetent and imma-

terial evidence should not be permitted to stand where it plays a most important part in the conviction.

Because of the importance of this phase of the case to the appellants we are including in the appendix to this petition for rehearing a more complete statement showing that appellant is entitled to a full and complete review on the subject of the admissibility of the Pineda testimony.

CONCLUSION.

We feel that this Honorable Court has erred in the foregoing respects. Accordingly, we respectfully request that this petition for rehearing be granted so that the Court may avail itself of the right to correct them and in order that no injustice may result from the decision heretofore entered.

Dated, San Francisco, California,
July 19, 1948.

Respectfully submitted,

JOSEPH B. KEENAN,

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CERTIFICATE OF COUNSEL.

We, Joseph B. Keenan and Harold C. Faulkner, do hereby certify that the foregoing petition, to our best judgment and belief, is well founded and is not interposed for the purpose of delay.

Dated, San Francisco, California,

July 19, 1948.

JOSEPH B. KEENAN,

HAROLD C. FAULKNER.

(Appendix Follows.)

Appendix.

Appendix

It was with regret that counsel for appellants read that portion of the opinion of the Court indicating that counsel had failed to present properly an important point to the Court on appeal. We feel very keenly that the criticism of the Court is not founded on the record. Local counsel for the appellants was under the impression, perhaps mistaken, after discussions with members of the Court in connection with the length of the brief which was permitted to be filed, that it was presented in a manner satisfactory to the Court. First, the quantity of evidence of Pineda pointed out by the Court to be 622 pages did not lend itself to setting out the substance of all in the brief. However, the substance which is set out in the brief, pages 26 to 36 alone, is sufficient to call for a reversal of the case. Therein the testimony is analyzed and a reference to the transcript is given. Counsel for appellant considered that when in the brief reference was made to page 9 of the appendix and page 18 of the appendix wherein is set out the full motion to exclude, which the lower Court denied, and the full motion to strike, which referred to the motion to exclude which also was denied, a full and complete specification of error in a full and accurate form had been presented for the use of the Court.

In the motion to exclude, as the Court points out, 24 separate phases of the Pineda testimony are sought to be excluded. The motion was made to exclude each part thereof. The motion on page 13 of the appendix to the brief of appellant contains the following:

Each instance testified to by Pineda of deliveries of eggs to the waterfront outlined in our opening brief was clearly inadmissible. Constant repetition of instances of changing eggs from one case to another were all clearly inadmissible. It was routine work in any egg-packing plant. All transactions relating to eggs emanating from the Petaluma plant at which there wasn't the slightest claim of irregularity or attempt to defraud the inspection service are clearly inadmissible.

We could go on and on multiplying instance after instance where under no theory of the case was the testimony admissible.

No. 11,339

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

SANG SOON SUR,

vs.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR APPELLEE.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SANG SOON SUR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTION.

Section 642 of Title 48, United States Code confers jurisdiction upon the Court below; and Section 645 of Title 48, United States Code grants appellate jurisdiction to this Honorable Court.

STATEMENT OF THE CASE.

The indictment in two counts charged the appellant with violation of Section 145(b), Title 26, U.S.C. (26 U.S.C.A. 145(b); Internal Revenue Code 145(b)) with wilfully, knowingly, unlawfully and feloniously evading or defeating a large part of his income taxes

for the calendar years 1942 and 1943 respectively. The specific amount evaded as laid in Count I being \$3132.97 (R. p. 7), and in Count II \$4684.36 (R. p. 11); and of accomplishing the same by filing a false and fraudulent income tax return for the said calendar years 1942 and 1943, stating specifically therein the items of gross income, net income, and net profit from business and rentals to be other than the true and correct figures for the said calendar years (R. pp. 7-12), and in furtherance of said scheme to evade and defeat his proper taxes due did keep and maintain and cause to be kept and maintained false, incomplete and untrue books and records of accounts falsely stating therein the amount of total receipts and the amount of net profits which he received from his business in the calendar years 1942 and 1943 respectively (R. pp. 7-11) and did conceal and cause to be concealed from the Collector of Internal Revenue and from any and all proper officers of the United States the true and correct gross and net income received by him and the sources thereof during the said calendar years 1942 and 1943. (R. pp. 8, 11-12.)

The appellant was a married individual during the calendar years 1942 and 1943, who was living with his wife and who had no dependents, and who, during all of the calendar years 1942 and 1943 maintained his legal residence and principal place of business in Honolulu. The accounting period of the business of the appellant was on the basis of the calendar year and not the fiscal year. (R. p. 5.) The appellant during the years in question, was engaged in the furniture business in Honolulu. (R. p. 111.)

The appellant, Sang Soon Sur, otherwise sometimes known as Song Soon Sur, Sun Soon Sur, or Sung Jun Shar, was indicted on December 14, 1945. He was arraigned on December 19, 1945 (R. p. 2) and on February 27, 1946, after unsuccessfully attempting to quash the indictment and moving by way of motion for a bill of particulars, both preliminary motions being denied, entered a plea of not guilty on February 27, 1946. (R. pp. 2, 3.)

Trial by jury was commenced on April 15, 1946, and concluded on April 19, 1946 (R. p. 3), at which time the jury returned a verdict of guilty upon both counts of the indictment. (R. p. 37.) On that date the defendant was sentenced upon Count I to imprisonment for a term of one year and one day and to pay a fine in the sum of \$2500.00 together with costs of prosecution; and upon Count II to imprisonment for a term of one year and one day and to pay a fine in the sum of \$2500.00 together with the costs of prosecution, the appellant to remain imprisoned until payment of the said fine or until otherwise discharged as provided by law—all prison sentences to run consecutively. (R. pp. 38, 39.) The appellant thereupon perfected his appeal to this Honorable Court from the judgment of the District Court of the United States for the District of Hawaii. (R. pp. 40, 45, 361, 51, 52, 40, 53, 356.)

The two specific questions involved and the manner in which they are raised in this appeal are enumerated in the statement of the case in the appellant's brief. The first question involves the admission in evidence as plaintiff's exhibits of the books and business

records of the appellant as Plaintiff's Exhibits "H", "I", "K", and "L". (R. pp. 114, 128.) The objection to the admission of these exhibits is founded upon violation of the Fourth Amendment in that their tender by the appellant and the retention by the Internal Revenue Agent of the exhibits constituted an unreasonable search and seizure. Objection to the exhibits and their admission in evidence was made for the first time by the appellant at the trial. (R. p. 125.) The appellant did not seek the return of the exhibits by motion to suppress.

The second specific question involved as enumerated in the appellant's brief is the admission in evidence of Plaintiff's Exhibits "M", "N", and "O". (R. pp. 223-258.) These exhibits constitute three separate statements or interviews reduced to writings tendered by the defendant to the Internal Revenue Agent during the course of the investigation. It was urged by the defendant at the trial that these exhibits were highly self-incriminating and virtually confessions and were not voluntarily given by the defendant. (R. pp. 184, 186, 191, 201.)

SUMMARY OF ARGUMENT.

Appellant's statement of the case as enumerated in his brief adverts to "various other matters or things" being admitted in evidence over objection of counsel for the appellant all of which were highly prejudicial to the appellant, and which deprived him of a fair trial; further urging that the errors complained of are

substantial, any one of which would require the reversal of the judgment herein. In view of the fact that these other matters adverted to in the appellant's brief are not succinctly presented as questions involved in the instant appeal, are not specific—but general—the appellee will dwell in his brief only upon those questions involved in this appeal as are specified and enumerated by the specification of errors relied upon, viz.:

1. The Court did not err in denying the appellant's motion to quash the indictment—Specification of Error No. 1. The Court did not err in denying and overruling the appellant's motion for acquittal at the conclusion of the plaintiff's case—Specification of Error No. 2.

2. The Court did not err in overruling the objection of the defendant to the receipt in evidence of Plaintiff's Exhibits "A", "B", and "C"—Specification of Error No. 3.

3. The Court did not err in overruling the appellant's objections to the receipt in evidence of Plaintiff's Exhibits "H", "I", "K", and "L"—Specification of Error No. 4.

4. The Court did not err in permitting over objection of the appellant, testimony by plaintiff's witness as to matters transpiring in the year 1945—Specification of Error No. 5.

5. The Court did not err in overruling the objection to the receipt in evidence of Plaintiff's Exhibits "M", "N", and "O"—Specification of Error No. 6.

6. The Court did not err in overruling appellant's motion to strike from the record certain portions of Exhibit "M" relative to prior criminal conviction of the appellant—Specification of Error No. 7.

7. The Court did not err in giving Plaintiff's Instruction No. 6 as modified—Specification of Error No. 8.

8. The Court did not err in giving Plaintiff's Instruction No. 19—Specification of Error No. 9.

ARGUMENT.

Appellant has elected to combine his argument upon Specifications of Error Nos. 1 and 2, asserting that they raise substantially the same point. While the appellee from the standpoint of the facts and evidence is not entirely in accord with this conclusion, it will nevertheless, for purposes of rebuttal thereto combine these two specifications.

1.

SPECIFICATIONS OF ERROR NOS. 1 AND 2.

Specifications of Error Nos. 1 and 2 are founded upon issues raised by motions filed by the appellant in the Court below, Specification of Error No. 1 being the denial of the appellant's motion to quash the indictment; and Specification of Error No. 2 being the denial of the appellant's motion for acquittal at the conclusion of the plaintiff's case. Inasmuch as

the applicable law covers both specifications, the appellee will, for sake of brevity, treat these two specifications as combined.

Appellant's motion to quash the indictment (R. pp. 13-17) urged that the income tax returns for the years 1942 and 1943 were not the returns of the appellant of income derived, had and received by him and were in truth and in fact not the returns of the appellant (R. p. 14), and further alleging that the returns were signed by the appellant in the capacity of agent of one Mong Bok, his wife. The motion further asserts that neither the business nor any incomes recited in the returns or the indictment are in fact those of the appellant, but in truth and in fact belong to his wife. The affidavit in support of the motion executed by the appellant admits the execution of the returns in question, but affirmatively alleges that the execution thereof was not in his own behalf but merely as agent for his wife; that the returns covered income derived from a furniture repair shop in Honolulu, that the business is in fact owned by his wife and not by the appellant; that all moneys and receipts received in connection with the said business were deposited in his wife's name in the Bishop National Bank of Hawaii; and that all checks for expenses incurred in the business were signed by his wife, or in the alternative, by the appellant for and on behalf of his wife. (R. p. 15.)

The plaintiff in answer to the motion to quash filed a replication and a motion to dismiss the motion to quash. (R. pp. 17-23.) The replication averred that on the nineteenth day of December 1945 and prior to

the filing of the motion to quash, the appellant did enter his general appearance in the proceedings and thereby submitted himself for all purposes to the jurisdiction of the trial Court. (R. p. 17.) The replication further denied that the returns for the years in question were prepared and filed by the appellant in the capacity of an agent for his wife (R. p. 17); and affirmatively alleges *in haec verba* that the returns in question were in fact prepared or caused to be prepared and filed not by the appellant in a capacity as agent or other fiduciary capacity but as the joint return of the appellant herein and his wife. (R. p. 18.) Further, that the caption and signature of the return for the calendar year 1942, as Count I of the indictment, recited the election of the appellant by way of joint return in the following terms as upon said return contained:

“Sang Soon Sur & Myung Bok Sur, 378 N. School Street, Honolulu, T. H.”,

and for the calendar year 1943 a similar election as a joint return in terms as follows:

“Mong Bok & Sun Soon Sur, 378 N. School Street, Honolulu, T. H.” (R. p. 19.)

The replication is supported by the affidavit of John Glutsch, Special Agent, Bureau of Internal Revenue, United States Treasury Department. (R. pp. 21-22.) As further and distinct grounds for denial and dismissal of the appellant's motion to quash, the appellee further affirmatively averred that as a matter of law the returns of the appellant for the years 1942 and

1943 being in fact the joint returns of the appellant and his said wife do, as a matter of law, constitute joint and several liability with respect of the true and correct tax due and payable thereunder, pursuant to the provisions of paragraph 51(b), Title 26, United States Code, (26 U.S.C.A. 51(b)), and pursuant to United States Treasury Department, Bureau of Internal Revenue Regulations 111 Sections 29.51-1-(3)-(b). (R. p. 20.) As a further, alternative, and distinct grounds of the appellee's motion to quash, the appellee affirmatively averred that as a matter of law, assuming the said returns as alleged in the motion to quash to be the individual returns of the appellant's wife, that the appellant nevertheless in the premises, and acting therein as agent for his said wife, does, together with his wife as principal, assume the responsibility for preparation of the said returns and incurs the attending liabilities for the penalties provided for erroneous, false, or fraudulent returns as provided in United States Treasury Department, Bureau of Internal Revenue Regulations 111, Section 29.51-2. (R. pp. 20-21.)

That a husband and wife living together, even though one has no gross income, may elect to file a return including the income of each in a single return made by them jointly is provided in 26 U.S.C.A. 51 (b):

“(b) Husband and wife. A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint

return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien or if the husband and wife have different taxable years. The status of individuals as husband and wife shall be determined as of the last day of the taxable year."

The liability with respect to the tax shall be joint and several. This liability is unqualified. The appellant and his wife therefore, having elected to file joint returns as such pursuant to the provisions of the statute (*supra*), assumed all of the attending liabilities in law flowing from the election. In this connection it is respectfully submitted that the declaration of the appellant and his wife upon the returns as being the joint return of husband and wife is conclusive in fact upon this issue of fact. The returns expressly declare that they are in fact the joint return of husband and wife, and nowhere therein does any election or reference to agency appear to rebut this fact.

It is respectfully submitted in this connection that Section 2(d) of Section 51, Title 26 United States Code (26 U.S.C.A. 51(2)(d)) further substantiates the position of the appellee herein, in that there is no denial by the appellant of the actual execution of the returns in question by him.

26 U.S.C.A. Section 51(2)(d):

"Signature presumed correct. The fact that an individual's name is signed to a filed return shall

be prima facie evidence for all purposes that the return was actually signed by him.”

United States Treasury Department, Bureau of Internal Revenue Regulations 111, Income Tax, Section 29.51-1-(3)(b) is further authority for the contention of the appellee upon this point:

United States Treasury Department Bureau of Internal Regulations 111, Section 29.51-1-(3)(b):

“Joint returns.—A husband and wife, if living together at the close of the taxable year, may elect to make a joint return (see section 51(b)), that is, to include in a single return made by them jointly the income and deductions of each, even though one has no gross income. In such a case, the tax shall be computed on the aggregate income. *The liability with respect to the tax shall be joint and several.* If one spouse dies prior to the last day of the taxable year, the surviving spouse may not include the income of the deceased spouse in a joint return for such taxable year. A joint return may not be made if either the husband or wife is a nonresident alien.” (Italics added.)

“A joint return of a husband and wife (if not made by an agent, see section 29.51-2) shall be signed by both spouses. An oath is not necessary, but both spouses shall verify the return as provided in section 51. If signed by one spouse as agent for the other, authorization for such action must accompany the return. (See section 29.51-2.) *The spouse acting as agent for the other shall, with the principal, assume the responsibility for making the return and incur liability for the*

penalties provided for erroneous, false, or fraudulent returns.” (Italics added.)

This regulation, having the force and effect of law, requires that a joint return of husband and wife—if not made by an agent—shall be signed by both spouses, and further provides in the event a joint return is executed by one spouse as agent for the other that authorization to this effect for such action must accompany the return. No such authorization accompanied any of the returns in question. It further affirmatively attaches to the agent, together with the principal, the responsibility for making the return and the absolute incurrence of liability for the penalties provided for erroneous, false, or fraudulent returns. It is respectfully submitted that the instant case, being one of evasion by means of filing false and fraudulent returns, comes unqualifiedly within the purview of the foregoing regulation.

United States Treasury Department Bureau of Internal Revenue Regulation 111, Section 29.51-2 enumerates further provisions with reference to the form of return when made by an agent:

United States Treasury Department, Bureau of Internal Revenue Regulation 111, Section 29.51-2:

“* * * Whenever a return is made by an agent it must be accompanied by the prescribed power of attorney, Form 935, except that an agent holding a valid and subsisting general power of attorney authorizing him to represent his principal in making, executing, and filing the income return,

may submit a certified copy thereof in lieu of the authorization on Form 935. *The taxpayer and his agent, if any, are responsible for the return as made and incur liability for the penalties provided for erroneous, false, or fraudulent returns.*" (Italics added.)

It is respectfully submitted that the record herein and the returns in question are devoid of evidence relative to the appellant's acting either in the capacity of an agent for his wife or the filing by him of the prescribed power of attorney as required by the foregoing section. It is further respectfully submitted that the reiteration in Section 29.51-2 (supra) of the liability of the taxpayer together with his agent for the penalties provided for erroneous, false, or fraudulent returns further substantiates the contention of the appellee upon the issues raised by Specifications of Error Nos. 1 and 2.

It is respectfully submitted that the appellant was accorded ample notice under the pleadings and specifically under the wording of the indictment of the charges against him. In this connection, the appellant by virtue of the denial of the motion to quash was placed on notice and accorded ample time and opportunity to prepare his defense to the charges set forth in the two counts of the indictment. The appellant was further apprised of the charges as detailed in the indictment to the effect that the proceedings at trial would be had upon the indictment without further particularization, in that the appellant filed a motion for a bill of particulars (R. p. 24) which was opposed

by the plaintiff by way of replication. (R. pp. 26-35.) The motion for a bill of particulars was denied. Thus the defendant was apprised by virtue of the denial as a matter of law of, first, the motion to quash, and second, the motion for a bill of particulars, that the charges as enumerated in the indictment were these charges which he was to defend by his plea of not guilty.

The substance of the appellant's Specifications of Error Nos. 1 and 2 is directed to the physical form of the returns in question. It is respectfully submitted that the instant indictment amply apprised the defendant of the charges in two counts of wilfully attempting to evade income taxes for the years 1942 and 1943, and does not charge or purport to refer to any charge, irregularity, deviation or use of official forms other than those required to be used. *Gusik v. United States*, 54 F. (2d) 618.

In the *Gusik* case, one of the points upon appeal was directed to the Court's refusal to admit evidence of the policy of the Internal Revenue Department which, it was alleged, permitted a taxpayer to state his income in a lump sum in lieu of setting forth specifically the various items and sources of such income. In characterizing that evidence as being immaterial, the Court said:

Gusik v. United States, 54 F. (2d) 618, 620:

"Obviously there was no prejudice in refusing to admit in evidence what in this case was immaterial. The controversy was not one dealing with appellant's failure to particularize the items or

sources of income. It was whether appellant made a false return as to total income and whether, in so doing, he was guilty of wilfully attempting to defeat and evade his tax.”

The appellant in his argument upon Specifications of Error Nos. 1 and 2 adverts briefly to variances in the indictment and proof. It is elementary that in trials involving evasions of income taxes that it is not necessary that the plaintiff prove an evasion of all the taxes charged in the indictment. The proof which is sufficient to convict is that proof which shows any substantial portion of the tax liability to have been wilfully evaded. The plaintiff is not required to prove the exact amount of taxes charged as being evaded as laid in the indictment, for the reason that the amount of the tax is not the gist of the offense of violation of Section 145(b), Title 26, United States Code (26 U.S.C.A. 145(b)). Neither is the plaintiff required to prove the exact amount of unreported income of a defendant. Proof of the exact amount of unreported income is not required for the reason that unreported income as such is not the gist of the offense.

United States v. Johnson, 319 U. S. 503, 517:

“Of course the government did not have to prove the exact amounts of unreported income by Johnson. To require more or more meticulous proof than this record discloses that there were unreported profits from an elaborately concealed illegal business, would be tantamount to holding that skilful concealment is an invincible barrier to proof * * *”

Cooper v. United States, 9 F. (2d) 216, 223:

“Exception is taken to the introduction of photostatic copies of the government documents forming the basis of the prosecution. Photostatic copies of government documents, duly authenticated, are now the accepted instrumentalities of introducing official records. Tax returns are logically public records, and made so by the revenue law. Their filing and preservation are official acts.”

Kurzrok v. United States, 1 F. (2d) 209, 211:

“It is assigned as error that the court, over the objection of the defendant, admitted in evidence photostat copies of the accounts made up by Kurzrok for his expenses at the Midland and Park hotels, and the exhibit thereto attached. But those documents, after payment, appear to have been lodged with the Department at Washington, and the photostat copies were certified in accordance with Section 882, Rev. Stats. (Comp. St. § 1494), and Section 306, Act June 10, 1921, 42 Stat. 24 (Comp. St. Ann. Supp. 1923, § 400 4/5 c.)”

It is respectfully submitted that the appellee's argument relative to availability of the original returns and productions thereof has no foundation in law in view of the provisions of 28 U.S.C.A. 661 (*supra*). It is respectfully submitted that this statutory foundation is conclusive as to the admissibility of the photostatic copies of the returns for the years in question, and does not necessitate or anticipate the laying of a foundation in law for the non-production of the originals. The statute by its very terms abrogates this requirement.

3.

SPECIFICATION OF ERROR NO. 4.

Specification of Error No. 4 is directed at the alleged error of the Trial Court in overruling the objections on behalf of the appellant to the receipt in evidence of Plaintiff's Exhibits "H", "I", "K" and "L", being certain of the books of accounts of the appellant. It is grounded upon the objection that the seizure of the Exhibits was a violation of the constitutional guaranties of the appellant under the Fourth and Fifth Amendments to the Constitution, and that no sufficient showing to establish that the books were turned over voluntarily in the real sense of that word was made. The specification appears to be founded upon dual grounds, first, that the seizure of the books constituted a violation of the appellant's guaranties under the Fourth and Fifth Amendments, and secondly, that no sufficient foundation was laid to establish the voluntary nature of the tender of the Exhibits to the investigating agent. These two objections raise issues which are so identical in nature and foundation in law that the appellee elects to treat them as a single issue.

Examination of the testimony of Clarence Lester Krause, Special Agent of the Bureau of Internal Revenue, Intelligence Unit, a witness on behalf of the plaintiff, establishes the foundation in law for the voluntary tender of the Exhibits to the Agent by the appellant. It is to be noted that the premises in question constituted the business premises of the appellant, and further that the appellant's son, James

Sur, did not participate directly or indirectly in any acquiescence or consent objected to in this Specification of Error No. 4.

The rights of a Revenue Agent of visitation to and entry upon a business premise such as in the instant case is grounded upon Section 3614 (a), Title 26 United States Code. (26 U.S.C.A. 3614 (a).)

26 U.S.C.A. 3614 (a) :

“To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.”

The foregoing statutory provision permits visitation upon premises of a taxpayer and the examination of any books, papers, records or memoranda bearing upon matters required to be included in a tax return by any officer or employee of the Bureau of Internal

Revenue to the end that the correctness of any return may be ascertained. It is respectfully submitted that in view of the foregoing explicit statutory authority the original entry upon the business premises of the appellant by Agent Clarence Lester Krause was a lawful one. This leaves for consideration the circumstances surrounding the tender of the books of accounts (Exhibits "H", "I", "K" and "L", referred to in Specification of Error No. 4) to agent Krause on two occasions, the first tender at the store premises, and the second tender the voluntary production of further records at the office of the Intelligence Unit in Honolulu at the time of the interview of the appellant in that office.

It is respectfully submitted that an examination of the testimony of Clarence Lester Krause, Special Agent of the Bureau of Internal Revenue, Intelligence Unit, a witness in behalf of the plaintiff (R. p. 108-126) unqualifiedly discloses that the tender of Exhibits "H", "I", "K" and "L" by the appellant to Krause was a complete, unqualified, and voluntary tender in every respect.

The witness Krause testified that he first met the appellant on January 27, 1945 about noontime, and that this meeting was occasioned in the discharge of his official duties in conducting an investigation with reference to the taxpayer appellant as to the payment of his income taxes. (R. p. 110.) On this occasion, Agent Krause walked into the furniture store of the appellant at 378 North School Street in Honolulu and inquired for Mr. Sang Soon Sur. The gen-

tleman of whom he made inquiry stated that he was Mr. Sang Soon Sur. (R. p. 111.) Agent Krause then produced his credentials and stated to the appellant that he was with the Bureau of Internal Revenue and that he wished to examine his income tax liability for the years 1942 and 1943. (R. p. 111.) The appellant then stated (in English) that he would like to get in touch with his son, James Sur. Agent Krause told him that was all right. The appellant thereupon telephoned to this son, engaged in a telephonic conversation presumably with him, and upon the conclusion thereof Agent Krause asked the appellant if he would produce all of his records which he had for the years 1942 and 1943 (R. p. 111.) The appellant then informed Agent Krause that he had but one book, a small bound book, for the year 1943, kept in English (R. p. 111.) Agent Krause thereupon asked him if he had any other books for the years 1942 and 1943. The appellant stated that he had none (R. p. 112.) Upon tendering the one book to Agent Krause, he then asked the appellant if he could use or retain this book with reference to the investigation. The defendant replied (in English) that the book could be kept as long as desired for income tax purposes. (R. p. 112.) This book subsequently became Plaintiff's Exhibit "H". (R. p. 114.)

Agent Krause further inquired of the appellant as to whether he had any bank records. The appellant stated that he had one bank account at the Bishop National Bank in Honolulu, a commercial checking account under the name of Wong Bok Sur, which

was his wife's name. (R. p. 115.) Agent Krause then inquired if the appellant had any other bank account. The appellant stated that he had none. Agent Krause inquired if he had a safety deposit box. The appellant stated that he had none. (R. p. 115.) Agent Krause then inquired if he would produce the bank statement and canceled checks if he had them upon the premises. The appellant thereupon looked around the premises, and with appellant's permission, Agent Krause assisted him in making a search for the bank statements. Together, Agent Krause and the appellant found practically all of the bank statements for the years 1942 and 1943. (R. p. 115.) Agent Krause thereupon cursorily examined and totaled the deposits shown on the bank statements submitted by appellant, and discovered that the statements represented sums considerably in excess of the reported business sales of the appellant on his tax returns for the years 1942 and 1943. (R. p. 115.)

Agent Krause then departed the premises, and before leaving made an appointment with the appellant to come to the office of the Intelligence Unit in Honolulu the following Monday, together with his son, and to bring with him all the bank records and any other records that he could find for the years 1942 and 1943. (R. p. 116.) The date of the foregoing original visitation to the business premises of the appellant occurred on Saturday, January 27, 1945.

At approximately 10 o'clock a.m. on January 29, 1945, the appellant in company with a young Korean man whom he identified as his son, James Sur,

appeared at the office of the Intelligence Unit in Honolulu. They had in their possession certain bank statements and checks which Agent Krause had previously examined on the premises and also bank statements and checks of the business for the year 1944. (R. p. 116.) Agent Krause inquired as to whether or not they had any other records for the years 1942 and 1943 and whether or not they were able to find any more. The appellant informed Agent Krause that he had not been able to find any more, and that the one book (the book tendered on the previous Saturday) was all that he had. (R. p. 116.) Agent Krause thereupon sat down to a conference with the appellant and his son, conducting an inquiry and examination into matter pertaining to the returns of the appellant for the years 1942 and 1943. This examination lasted approximately two hours. Another Revenue Agent was present part of this time. (R. p. 116.) Agent Krause's examination pertained to deposits in the appellant's bank account, elaboration of statements contained therein, the activities of the appellant with reference to Tonamoshis, income of his dependents, whether or not the appellant had any unreported sales from his business other than those entered upon his income tax returns, details relative to the appellant's methods of book-keeping and book entries of sales, and other matters relevant to his returns. (R. pp. 116, 117.) Throughout this examination, the appellant was not very helpful. (R. p. 116.) James Sur, the son of the appellant, was present during the entire time and on occasions when the appellant stated he did not under-

stand the question asked of him in English, his son, James Sur, would act as an interpreter, interpreting the question asked from English into Korean and in turn from Korean into English, reciting the answer to Agent Krause in English. Most of the time, however, the appellant himself answered Agent Krause directly in the English language without benefit of interpreter. (R. p. 118.) After approximately two hours the appellant and his son left the office of the Intelligence Unit after voluntarily submitting the bank statements upon the same basis as the other book, to be kept as long as desired for income tax purposes. (R. p. 118.) Agent Krause in the interim continued to conduct his investigation of the affairs of the appellant as reflected in the returns relative to the years 1942 and 1943.

In furtherance of his examination and investigation and on February 10, 1945 Agent Krause again visited the business premises of the appellant at 378 North School Street, Honolulu, and inquired of him as to certain items reflected upon deposit tags in the bank account. (R. p. 119.) The appellant stated that he could not remember but that he would try to recall and let Agent Krause know later. Agent Krause thereupon inquired of the appellant as to his method of handling cash and cash receipts on the business premises, the appellant stating that he kept his cash on hand in a drawer in a cabinet on the business premises. (R. p. 122.) The appellant thereupon withdrew a paper bag from the cabinet, emptied the contents thereof, and Agent Krause requested that the appellant count the bills therein, which he did. The

bag contained five thousand dollars in currency, the appellant stating that the sum represented Tanamoshi moneys which he had collected. (R. p. 122.) Within the range of visibility and lying on a corner of the desk at which Agent Krause and the appellant sat, were some account books. Agent Krause inquired of the appellant as to what these books of accounts were. The appellant did not reply but tendered the books to Agent Krause, placing them before him. (R. p. 122.) The books, upon examination by Agent Krause, developed to be books of accounts some of which were in the Korean language and some in the English language, covering the years 1942 and 1943. (R. pp. 122, 123.) Agent Krause then inquired as to whether or not Mr. Sur would mind letting the Bureau have these records voluntarily. He replied that he had absolutely no objections. Agent Krause thereupon took the records with him, returned to the Intelligence Unit office, and proceeded to examine them. These books subsequently became Exhibits "I", "J", "K" and "L" of the plaintiff. (R. pp. 127, 128.)

Upon the trial, Agent Krause was asked to state his authority for the investigation of the appellant and testified that it was founded upon Section 3614 of the Internal Revenue Code (26 U.S.C.A. 3614.) (R. p. 126.)

It is respectfully submitted that the foregoing foundation of factual evidence at the trial established beyond question that Plaintiff's Exhibits "H", "I",

“K” and “L” were voluntarily tendered to Agent Krause.

That the constitutional immunity against unreasonable searches and seizures is a personal right which may be waived is well settled. The purpose of the constitutional provision against unreasonable searches and seizures is to protect the citizenry against arbitrary and tyrannical power. A defendant may waive the manner and method of acquisition of his papers or books and thereupon the constitutional objection is removed instanter. The foregoing rules of law it is respectfully submitted are too well settled to require the citation of authorities.

It is respectfully submitted that the consent of the appellant was unequivocal and specific. The appellant, being a taxpayer residing and having his business situs within the Internal Revenue Collection District of Hawaii, is presumed to be familiar with the requirements of taxation laws pertaining to the filing of annual income tax returns; and the visitations of Agent Krause to the premises as detailed above, being for the purpose of examination of matters relevant to the return and expressly limited to these matters were made well known to the appellant.

It is to be noted that only upon rare occasions did the son of the appellant, James Sur, act in the capacity of an interpreter on behalf of his father. There is no dispute of fact but that the appellant was the person in charge of the business premises and the person of whom the constitutional privilege com-

plained of was invoked. It is further to be noted that at no time did the appellant's son, James Sur, either directly or indirectly—or as an asserted agent on behalf of his father—purport to extend or consent to the voluntary tender of the Exhibits in question. All acts in that connection were solely and exclusively those of the appellant. This fact is undisputed.

The case of *United States v. Lustig et al.*, 67 F. Supp. 306, it is submitted, is a recent decision upon the point in question, and sustains the position of the appellee upon the issue raised in Specification of Error No. 4. The defendant moved by notice of motion for an order to suppress certain evidence consisting of papers voluntarily tendered to Internal Revenue Agents at the time of the examination of the books of a corporation, said examination being invited by the taxpayers. The defendants who were officers and employees of the taxpayers had knowledge at the time of the invitation of examination that investigation into the tax liability had been commenced and that it would lead to discovery of fraudulent entries in the taxpayers' books, and to fraudulent income tax returns filed. One of the issues raised was whether or not the books, records and documents were obtained by Government agents in the course of an unreasonable search or seizure, or by force, fraud, stealth, trick, device or improper means. The facts in the *Lustig* case—as they pertain to the instant appeal—were that an Internal Revenue Agent communicated by telephone with one of the defendants,

advising him that he desired to make an investigation of the books of one of the defendants for the purpose of checking tax returns. At this time, the defendants knew that any such investigation would or might disclose the fraudulent practices carried on by the corporation in connection with its income tax returns. The defendant suggested to the Agent in the face of this that an examination be deferred for a time. Several weeks thereafter, Special Agents and Internal Revenue Agents examined the books and records of the defendants and discovered that the defendants had understated the corporate taxpayers' income in substantial amounts.

The Court held that in these circumstances the defendants were neither coerced, compelled, nor induced—either with or without process—to make incriminatory disclosures; and that the examination of the books was invited by the defendants with full knowledge that an investigation had been commenced which would lead to the discovery of fraudulent entries in the books and with full knowledge that said investigation could be commenced and continued with or without the consent of the defendants. The Court further held in its conclusions of law that the corporate records, books and documents of the defendants were not produced as a result of any inducement, even slight, held out to the defendants or the corporate taxpayers by any person in authority or person connected with the Government; nor were the records, books and documents obtained by Government agents in the course of an unreasonable search or seizure,

or by force, fraud, stealth, trick or device or improper means of any kind. Application of Henry Lustig Co., Inc., et al., *United States v. Lustig et al.*, 67 Fed. Supp. 306.

It is respectfully submitted that Plaintiff's Exhibits "H" "I", "K" and "L" were properly admitted in evidence and were voluntarily tendered to the investigating officer.

4.

SPECIFICATION OF ERROR NO. 5.

Specification of Error No. 5 is directed to the alleged error of the trial Court in permitting the plaintiff's witness, Agent Clarence Lester Krause, to testify as to matters which took place in 1945 at the time of the investigation of the appellant.

The investigation of the appellant was commenced by Agent Krause on January 27, 1945. (R. p. 110.) Details covering Agent Krause's initial visitation to the premises and events transpiring thereafter relevant to the issues upon this appeal have heretofore been enumerated and discussed in Specification of Error No. 4. It is assumed for want of particularization of Specification of Error No. 5 that the subject of the specification is directed to certain portions of the testimony of Agent Krause recited in his direct examination (R. pp. 119-122), the pertinent parts thereof being Agent Krause's testimony as to what transpired upon his return to the premises of

the appellant on February 10, 1945. (R. p. 119.) It is noted that Agent Krause's visit on February 10, 1945, and conversations with the appellant at that time were directed to matters concerning the examination and investigation of the appellant relative to his bank account, deposit tags and certain cancelled bank checks discovered by Agent Krause in the course of his investigation. (R. pp. 118, 119.) On this occasion Agent Krause discussed with the appellant amounts and methods of keeping of his current business sales records. (R. p. 119.) Upon this occasion, the appellant disclosed to Agent Krause his current sales records which revealed no entries for two days prior to February 10, 1945. The appellant volunteered that he had been too busy and had not been able as yet to record his sales for the previous two-day period, but was keeping them in his head. (R. p. 119.) Agent Krause then asked the appellant if he would mind showing him the amount of cash which he had on hand representing the sales which the appellant had made on the previous day and not entered in his current sales book. (R. p. 120.) The appellant then voluntarily disclosed his cash on hand in the sum of two or three hundred dollars, stating that the amount was all of the cash that he had on hand on the premises. (R. pp. 121-122.) However, at this time, the defendant further admitted that he had other cash which he kept in a cabinet in the premises—testimony regarding the paper bag and five thousand dollars in currency therein having heretofore also been discussed in the preceding Specification of Error.

The investigation of the appellant with reference to his tax liability was commenced on the examination conducted by Agent Krause at the time of his original visitation to the premises of the appellant on January 21, 1945. The subject of the instant specification raises the relevancy of the testimony of Agent Krause at the trial of events transpiring at the time of his visit on February 10, 1945, approximately twenty days thereafter.

The offense of which the appellant was found guilty is that of wilful evasion of income taxes for the years of 1942 and 1943.

To the rule of law that events of a similar nature and description having no relevancy to criminal acts with which a defendant is charged are not admissible in a criminal trial, there exist well-established exceptions in the field of income tax evasion prosecutions. These exceptions are predicated upon the relevancy of acts, doings, records, documents, methods of operation, performances, conduct of business and all other activities of a taxpayer defendant which will in any way tend to establish a method of operation or a continuing performance of an act or mode of conduct of such nature which tends to establish a fixed mode of operation of a business, or the receipt of unreported or unexplained income by a taxpayer.

Continuance of income during taxable years either prior or subsequent to the years charged in an indictment are admissible in establishing the intent of the taxpayer as they pertain to the charges laid in the indictment, and upon the element of wilfulness

to evade in connection therewith. It is noted that testimony asserted as irrelevant here relates to physical events transpiring upon the premises of the appellant and are not documentary by way of introduction of income tax returns of the appellant for other years, or upon documentary matters for other years which may have been contained in any of his books of accounts.

It is respectfully submitted that the following cases substantiate the position of the appellee in respect of Specification of Error No. 5 in that the verdict of guilty herein covered the years 1942 and 1943 and that the evidence asserted to be irrelevant is in fact relevant upon the issue of intent, and more particularly wilful intent as defined in Section 145 (b), Title 26 United States Code (26 U.S.C.A. 145 (b)) and as disclosing the method of operation of the appellant's business and a continuous mode or method of operation or performance by the appellant in the conduct of his business.

Rose v. United States, 128 F. (2d) 622, 625
(certiorari denied, 63 S. Ct. 47, 317 U.S. 651,
87 L. Ed. 524):

"The income tax returns of appellant for the years 1935 and 1938 were offered in evidence. The only objection interposed to their admission was that they were incompetent, irrelevant, and immaterial. In overruling the objection, the court stated that they were admitted on the theory that they might be material as showing the continuance of the income and conduct. No further

reference was made to such returns throughout the entire trial. The trial concerned itself with transactions involving the giving of bribes in 1936 and 1937. It may be conceded, without deciding, that the returns were not admissible in evidence, and that there was no occasion for the statement of the court. But the guilt of appellant was clearly shown by competent evidence, and it is transparently plain that the introduction of the returns and the statement of the court made in connection therewith were harmless.”

United States v. Skidmore, 123 F. (2d) 604, 610
(certiorari denied, 62 S. Ct. 626, 315 U. S.
800, 86 L. Ed. 1201):

“Appellant further contends that the court erred in the following instruction to the jury: ‘With respect to the years prior to 1929, it is presumed that the defendant has complied with the provisions of the Internal Revenue Laws and has filed a return and paid his income tax in such of those years when he had a net income subject to tax. Evidence that he did not file a tax return for any of these prior years may therefore be considered by you as an admission by him that he did not have a net income in excess of the amounts for which he would have been required by law to have filed a tax return’. Appellant contends that this instruction constituted reversible error for the reason that he was not charged with any crime for the years prior to 1933. Of course this is true and the court so told the jury in the later instructions. When the instructions are read together it is found that there is no inconsistency in this respect. Moreover, it could

not have prejudiced appellant in any way, for the verdict of guilty covered only the years of 1936, 1937 and 1938.”

United States v. Sullivan, 98 F. (2d) 79, 80:

“Although the attempt to evade the tax for a given year is a separate offense from an attempt to evade the tax for a different year; they are clearly crimes ‘of the same class.’ Moreover, the evidence of intent to evade the tax in one year is competent evidence of intent to evade the tax in a later year. *Emmich v. United States*, 6 Cir., 298 F. 5, 9, certiorari denied 266 U.S. 608, 45 S.Ct. 93, 69 L.Ed. 465; cf. *Harris v. United States*, 2 Cir., 273 F. 785. Indeed the crimes charged in the indictment describe one course of conduct extending over several years, which results in separate offenses simply because the duty to file a return pay the tax is one that recurs every twelve months.”

Malone v. United States, 94 F. (2d) 281, 286
(certiorari denied, 58 S. Ct. 944, 304 U. S.
562, 82 L. Ed. 1529):

“Having disposed of the first assignment of error with reference to the abatement plea, we now come to the second assignment, wherein it is claimed the court erred in admitting evidence of tax evasion for the years 1926, 1927, and 1928. It seems, however, that defendant is in no position to raise such question with reference to the two former years for the reason that evidence was not admitted for such purpose. No income tax return for those two years was admitted which, of course, would have been necessary if the government had sought to show an evasion.

There was some evidence with reference to defendant's bank deposits for these years contained in the stenographic transcript of the colloquy which took place between the defendant and the revenue agents, which not only was not objected to by counsel for the defendant, but at his request was admitted and read to the jury. The only other testimony we find relevant to 1926 and 1927, is the testimony of the attorneys heretofore referred to relative to the payment of money to the defendant while chairman of the Tax Commission, and was for the purpose of showing defendant's source of income rather than an evasion of the income tax thereon. As for the year 1928, there was admitted evidence of defendant's currency deposits under the same circumstances as they were made in 1929 and 1930, and that he failed to report such money as income in his return for 1928. The courts have many times held that wilful intent is one of the essential elements in the proof of the crime of evasion of income tax. *Capone v. United States*, 7 Cir., 51 F. 2d 609, 76 A.L.R. 1534; *Oliver v. United States*, 7 Cir., 54 F. 2d 48, 50; *Paschen v. United States*, 7 Cir., 70 F. 2d 491, 498."

Emmich v. United States, 298 Fed. 5, 9 (certiorari denied, 45 Supreme Court 93, 266 U. S. 608, 69 L. Ed. 465) :

"It is claimed the trial court erred in admitting evidence of the failure of defendant to file a tax return for 1920, and evidence of his occupation, income, and expenditures during that year. The second count in the indictment, on which the defendant was convicted, charges him with

'knowingly, willfully, and feloniously attempting to defeat and evade the tax imposed by the Revenue Act of 1921,' by knowingly, willfully, and feloniously making a return of income far less than the amount of which he was actually the recipient. It is undoubtedly the rule that, in a trial for one offense, evidence of other and distinct offenses is inadmissible, subject, however, to this exception: That, if intent or motive be one of the elements of the crime charged, evidence of other like conduct by the defendant at or near the time charged is admissible. Both rule and exception have been so frequently stated that it is not thought necessary to cite authority, further than to call attention to the case of *Shea v. United States*, 236 Fed. 97, 149 C.C.A. 307, decided by this court, and *Harris v. United States* (C.C.A.) 273 Fed. 785, wherein some of the more recent cases are cited."

It is respectfully submitted that in addition to the foregoing authorities, the case of *Spies v. United States*, 317 U.S. 492 (decided January 11, 1943) is supporting authority of the strongest nature upon the issue of relevancy of the testimony in question as based upon the element of wilful intent. Wilful intent is an essential element of the offense of which the appellant was charged under the indictment. The petitioner in the *Spies* case was convicted of attempting to defeat and evade income taxes in violation of Section 145 (b), Title 26, U. S. Code (26 U.S.C.A. 145 (b)). In commenting upon the intent and the wilful aspect of the offense charged in the indictment, the Supreme Court at page 498 states:

“ . . . But in view of our traditional aversion to imprisonment for debt, we would not without the clearest manifestation of Congressional intent assume that mere knowing and intentional default in payment of a tax, where there had been no willful failure to disclose the liability, is intended to constitute a criminal offense of any degree. We would expect willfulness in such a case to include some element of evil motive and want of justification in view of all the financial circumstances of the taxpayer . . . ”

and at page 499:

“ Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation. Nor would we by definition constrict the scope of the Congressional provision that it may be accomplished ‘in any manner.’ By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one’s affairs to avoid making the records usual in transactions of the kind, and any conduct the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.”

“ In this case there are several items of evidence apart from the default in filing the return and

paying the tax which the Government claims will support an inference of willful attempt to evade or defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records . . .”

It is respectfully submitted that the testimony of Agent Krause upon matters relevant to the investigation and examination of the appellant occurring during the course of the investigation in the year 1945 was relevant and material.

5.

SPECIFICATION OF ERROR NO. 6.

Specification of Error No. 6 is directed to the overruling of the objections of the appellant to the receipt in evidence of its Exhibits “M”, “N” and “O”, Exhibits “M”, “N” and “O” being statements taken upon the examination of the appellant, for the reason that the plaintiff failed to establish that the statements were the voluntary act of the appellant.

During the course of the examination by Agent Krause of the books, papers and records of the appellant upon the matters required to be included in his return, three statements or interviews had between the appellant and Agent Krause touching upon the examination were reduced to documentary form.

The first of these statements was taken by Agent Krause on February 12, 1945 (R. p. 156) and signed by the appellant five days later, on February 17, 1945. (R. p. 171.) This statement subsequently became Plaintiff's Exhibit "M" of the instant specification. (R. p. 186.) The second statement was taken on February 12, 1945 and signed on the same date. (R. pp. 186-187.) This statement subsequently became Plaintiff's Exhibit "N" in the instant specification. (R. p. 192.) The third statement was taken and signed on February 17, 1945. (R. p. 192.) This statement subsequently became Plaintiff's Exhibit "O" in the instant specification. (R. p. 201.)

Inasmuch as the appellant in Specification of Error No. 6 has elected to combine the alleged errors in respect of Plaintiff's Exhibits "M", "N" and "O" in one specification, the appellee will treat the combined exhibits accordingly, with two qualifications:

First: Contending that none of the said exhibits are in fact confessions of the appellant, but merely the reduction to writing of the appellant's statement had at the respective instances of the examination of his books, papers and records upon the matters required to be included in his return and constituting the appellant's explanation and amplification of the contents of his books and records, mode of conduct of his business and the manner and method of the keeping of his records.

Secondly: That Plaintiff's Exhibit "M", being taken and transcribed on February 12, 1945, and

signed five days later by the appellant does not, in any manner, due to the five-day lapse of time between the examination and the signing, constitute a confession in law of the appellant. Categorically, the appellee denies that any of Plaintiff's Exhibits "M", "N" and "O" are confessions, or that the law relative to foundation or admissibly applicable to confessions are applicable thereto.

To the end, however, that the issue raised by appellant in Specification of Error No. 6 may be met, the following factual circumstances surrounding the three exhibits are herewith chronologically referred to: Plaintiff's Exhibits "M", "N" and "O".

Agent Krause testified that he took three statements from the appellant. The first statement was taken on February 12, 1945, at the office of the Intelligence Unit in Honolulu in the afternoon of that day. (R. p. 156.) Present were Agent Krause, the appellant, the appellant's son, James Sur, who acted as interpreter when needed, and a stenographer, Miss Irene Hildreth, an employee of the Intelligence Unit.

The second statement was taken in the form of an affidavit shortly after the first statement and was taken and signed on February 12, 1945 at the office of the Intelligence Unit in Honolulu. On that occasion Agent Krause and the appellant together with his son, James Sur, in the capacity of interpreter, were present. (R. p. 156.)

The third statement was taken on February 17, 1945, five days later, at the office of the Intelligence

Unit in Honolulu. (R. p. 157.) Present were Agent Krause, the appellant, his son, James Sur, in the capacity of interpreter, and a stenographic employee of the Intelligence Unit, Miss Gladys M. Callaway. (R. pp. 157-158.)

Plaintiff's Exhibit "M"

Upon the taking of the first statement, the appellant's son was present during the entire period, acting in the capacity of an interpreter, interpreting from the English language to the Korean language and from Korean to English. (R. p. 157.) The appellant's son, James Sur, acted as interpreter for his father where needed. This for the reason that the appellant at times would speak in the English language to Agent Krause, and at other times he would speak through his son, James Sur, in the Korean language. Agent Krause was able to understand the English spoken by the appellant, which English is designated locally as "extended English or pidgin English". (R. p. 157.) The appellant's son, James Sur, spoke in good English. (R. p. 158.) The oath was administered by Agent Krause to the appellant prior to the taking of his statement, the oath being interpreted to the appellant by his son. (R. p. 158.) Agent Krause inquired as to whether or not the appellant understood he was appearing voluntarily before him. The appellant stated that he so understood. (R. p. 158.) Agent Krause admonished the appellant as to his constitutional rights against incriminating himself, and in this connection asked the appellant whether he understood he had the right under the Federal Constitution to refuse

to answer any questions asked him that would incriminate him under the federal law. (R. p. 159.) Agent Krause did not offer the appellee any reward or immunity of any nature whatsoever. (R. p. 159.) Agent Krause informed the appellant that the information he was about to give could be used against him at a later date. (R. p. 159.) Agent Krause had theretofore, on February 10, 1947, made an appointment with the appellant to come to the office of the Intelligence Unit in Honolulu for the purpose of giving a sworn statement. (R. p. 161.) On this occasion, on February 10, 1947, Agent Krause inquired as to whether or not appellant would care to come in and make a sworn statement, to which appellant replied that he would be agreeable. (R. p. 161.) At the time of the taking of the statement, there were present in addition to Agent Krause, the appellant, the appellant's son, James Sur, and Miss Hildreth. (R. p. 161.) Miss Hildreth in her capacity as an employee of the Internal Revenue Bureau recorded the questions and answers in shorthand form. (R. p. 162.)

James Sur, son of the appellant, testified that before the signing of the first statement Agent Krause advised the appellant of his constitutional rights, and of the fact that the statement could be used against him. (R. p. 167.)

Agent Krause testified that Exhibit "M" was taken on February 12, 1945, and signed five days later on February 17, 1945, and that between those dates it was being transcribed. (R. p. 171.)

Inasmuch as appellant concedes that no physical compulsion was exercised in connection with the taking of any of the exhibits in question, that aspect of the issue involved in the instant specification will not be discussed. (R. p. 171.)

Agent Krause presented the first transcribed statement—Plaintiff's Exhibit "M"—to the appellant and advised both the appellant and his son to read it, requesting the appellant's son to interpret the statement to the appellant. (R. p. 173.) This he did.

The Court, making Agent Krause its own witness, asked him if he had employed any persuasive methods upon the appellant in taking the statement or in inducing him to sign it. Agent Krause stated that he had not. (R. p. 175.) The Court also inquired as to the purpose of having the statement sworn to. Agent Krause testified that this was accomplished as a part of the officially prescribed procedure in making tax investigations and that he administered the oath under the authority conferred upon him by statutory law—Section 3614 of the Internal Revenue Code. (R. p. 175.) Miss Irene A. Hildreth, an employee of the Office of the Internal Revenue Agent in Charge, Honolulu, transcribed the statement, Plaintiff's Exhibit "M", in her capacity as a stenographer. (R. p. 177.) She testified that the appellant's son, James Sur, was present at the time of the taking of the statement, acting in the capacity of interpreter for the taxpayer appellant, and that she reduced to shorthand dictation the questions and answers constituting the statement—Plaintiff's Exhibit "M". (R. p. 178.)

Agent Krause identified the signature "Sang Soon Sur" written in ink upon the last page of Plaintiff's Exhibit "M" as that of the appellant and testified that he witnessed the appellant affix his signature thereto on February 17, 1945. (R. p. 183.) Agent Krause identified the certification by the interpreter, James Sur, which certification was also signed in Agent Krause's presence. (R. p. 183.) Agent Krause further identified the initials "S.S.S." appearing on pages one to sixteen inclusive of Plaintiff's Exhibit "M" at the bottom of each page thereof being the initials of Sang Soon Sur which the appellant affixed thereon in Agent Krause's presence. (R. pp. 183, 184.)

Plaintiff's Exhibit "N"

Plaintiff's Exhibit "N" is an affidavit of the appellant, signed by him and certified to by the appellant's son, James Sunai Sur, as witness and interpreter for his father. Agent Krause testified that prior to the signing thereof he stated to the appellant that he was not required to sign it under the Constitution of the United States (R. p. 187); and further, he stated to the appellant that it could possibly be used against him at a later date. (R. p. 187.) Agent Krause admonished the appellant as to his right of refusal to answer, and thereupon administered the oath to the appellant. (R. p. 187.) Plaintiff's Exhibit "N" was signed approximately one-half hour after the taking of the first statement—Plaintiff's Exhibit "M". Exhibit "N" was made out in the handwriting of Agent Krause in lieu of the usual procedure of stenographic notes and transcription thereof, for the reason that

there was no stenographer available at the time, it being 5:30 o'clock p.m. (R. p. 188.) This exhibit was also translated to the appellant by his son, James Sunai Sur, prior to the signing thereof. (R. p. 188.)

Plaintiff's Exhibit "O"

Plaintiff's Exhibit "O" was taken on February 17, 1945, in the office of the Intelligence Unit in Honolulu and signed on the same date. (R. p. 192.) Present at that time were Agent Krause, the appellant, his son in the capacity of interpreter, and Miss Gladys Callaway. (R. p. 193.) Agent Krause admonished the appellant as to his constitutional rights prior to the taking of the statement (R. p. 193), and stated to him that he was not required to testify against himself and that anything he said or any information given could be used against him later in any subsequent proceeding. (R. p. 193.) Agent Krause inquired as to whether or not the appellant was appearing voluntarily in connection with his income tax liability, to which the appellant replied that he was. (R. p. 193.) Agent Krause identified his signature upon Plaintiff's Exhibit "O", the oath thereon, and the signature of Sang Soon Sur upon the exhibit. (R. p. 196.) Agent Krause further testified that he witnessed Sang Soon Sur, the appellant, signing the statement, and further identified the signature of James S. Sur as interpreter thereon (R. p. 196), and the initials "SSS" on pages one and two as being the initials of the appellant. (R. pp. 196, 197.)

Gladys M. Callaway, clerk-stenographer employee of the office of the Intelligence Unit, acted as stenog-

rapher in the taking of this exhibit. (R. p. 197.) She testified that there were present at that time Agent Krause, the appellant, James Sur, acting as interpreter for the appellant, and herself, she being summoned to the conference room for the purpose of taking the statement of the appellant. (R. pp. 199-200.) It is respectfully submitted that the plaintiff, in the circumstances, has more than amply met and fulfilled the foundational requirements for admission of the foregoing exhibits as reflected by the foregoing portions of the record herein.

The statutory authority for the examination of the appellant, the subject of Specification of Error No. 6, rests in Section 3614, Title 26, United States Code (26 U.S.C.A. 3614):

“(a) To determine liability of the taxpayer. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.”

It is respectfully submitted that the three separate statements do not in any degree alter the validity and voluntary aspect of the issues of law or fact raised in this specification. This Court will judicially note that matters pertaining to income taxes and more particularly to investigations concerning the evasion thereof, are in themselves and by their very nature matters of great complexity requiring diligent and conscientious effort on the part of an investigating agency and agents together with consumption of indefinite time in arriving at a finding or conclusion based upon examination of either books of accounts or by way of interview to determine whether or not a taxpayer has included in a return all matters required to be included therein. This is true if it pertains to either a civil or criminal investigation and the attending liabilities relative to each. The instant case being one of criminal liability, in itself warrants the persistency and intelligent investigating of the affairs of the appellant taxpayer as conducted by Agent Krause. Otherwise, it is submitted, Agent Krause would have become derelict in the discharge of his duties.

The appellant by way of numerous reference in appellant's brief, is characterized as an alien lacking in understanding of the English language. It is also urged in a reference therein that the appellant, living in the Territory of Hawaii which had recently "come through a period of martial law" was "presumed to be terrified out of his wits" by the mere appearance of a federal agent. It is respectfully sub-

mitted that the nationality status of a taxpayer bears no relevancy to his liability as such, either civil or criminal. Further, the appellant had been a resident of the Territory of Hawaii for a great number of years and it is reasonable to assume, having been in business during that period of time, that he had familiarized himself with current American business methods and procedure and more particularly those requirements thereof pertaining to the payment of business and personal taxes. Appellee considers this reference to martial law as abhorrent and having no relevancy to these proceedings, any testimony herein, or being of any materiality whatsoever upon the issue raised in the instant specification.

It is respectfully submitted that ignorance of a taxpayer relative to matters contained in a tax return, or of the subject of an interview or examination relative to the return is solely a question of fact. That a taxpayer may not escape the payment of just taxes or the attending liability of either civil or criminal responsibility attaching hereto by an assertion of ignorance of the law or the requirements in connection therewith is well settled.

The case of *Cooper v. United States*, 9 F. (2d) 216, 222, cogently states the rule:

“But it is claimed that knowledge on the part of the defendants of the contents of the returns is not shown; that they may have been made up by employees, without personal knowledge on the part of the Coopers. It was shown that defendants were the sole owners of the corporate stock.

The corporation was a family affair. They were in sole and entire charge of the business; upon them was enjoined the duty of making these returns under oath. The owner of a business need not be the actual bookkeeper, to be familiar with the affairs and finances of that business. It would present a somewhat startling situation if a taxpayer, charged by law with this duty, could sign and file a false return, made to defraud the government, and escape punishment by disclaiming knowledge of that which he has sponsored. Of course, he would not be liable for innocent clerical mistakes; but he must be held to know that which it is his duty to know, and which he solemnly promulgates."

In the circumstances the appellee does not consider that further discussion of this phase is necessary or warranted.

The appellee does not dispute that this Honorable Court may, in independent manner, determine as to whether or not Plaintiff's Exhibits "M", "N" and "O" were the voluntary act of the appellant herein. In the circumstances however, and preliminary to this concession, the appellee respectfully submits that the exhibits, while self-incriminating in nature, are not in the nature of confessions which would categorically require that the legal tests of voluntariness apply. The exhibits are the reduction to writing of the examination of a taxpayer by a duly authorized Revenue Agent of the Treasury Department upon a matter within the sphere of his official duties. The fact that the exhibits are signed, witnessed, and attested under oath does not

in itself constitute the exhibits as confessions in that sense of the word. It is noted that the appellant refers to Exhibits "M", "N" and "O" as statements self-incriminating in nature and as being virtually confessions. It is respectfully submitted that the exhibits are not in the nature of confessions and that therefore the test of legal sufficiency of the exhibits as constituting the voluntary act of the appellant is not in issue in the instant appeal.

It is respectfully submitted that there being three separate reductions to writing of interviews and statements had with the appellant herein, does not in any manner affect the validity or admissibility of any of the exhibits in question, nor the requirements in law relative to the establishment of their voluntariness. The law upon this is well settled.

Thomas v. United States, 15 F. (2d) 958, 960:

"The special agent who, as he claims, took the defendant's written statement which was offered in evidence, testified to the conversation between himself and the defendant on that occasion. It is assigned as error that the court refused to withdraw from the jury the testimony of the agent after it was discovered the defendant had made a written statement; also that the court erred in permitting the introduction of the written statement, and in overruling defendant's motion to exclude the written statement and in permitting the witness to testify that the written statement of defendant was a voluntary statement. As to the last point, it is sufficient to say that the agent, in both direct and cross-examination, told in great

detail the interview between him and the defendant at the time the written statement was made, and there could have been no possible prejudice arising from the statement objected to. The other points are obviously without merit. A confession or statement of incriminating facts is always competent and may be shown to have been made in writing or orally, or part in writing and part orally, or both in writing and orally, on one occasion or on different occasions."

It is to be noted that the record herein, and particularly with reference to the testimony of Agent Krause, is replete with reiteration of the subject matters of the interviews had by Agent Krause with the appellant to such a degree that the appellee does not consider the quotation of excerpts therefrom as warranted.

Appellant lays great stress upon the case of *Ashcraft v. Tennessee*, 322 U. S. 143, as authority for the contention that the statements were not voluntarily made. The appellee has no dispute with the basic holding of law as enunciated in the *Ashcraft* case under the facts presented therein. An examination of the facts in the *Ashcraft* case however, will disclose that the facts in that case are so grossly and factually distinguishable from those in the instant case that it is not dispositive of the issue raised herein.

One Ware was found guilty of the charge of murder of Ashcraft's wife. Ashcraft, husband of the deceased, was tried jointly with Ware and convicted as an accessory before the fact. Both were sentenced to

ninety-nine years in the state penitentiary. In applying to the Supreme Court for certiorari, the petitioners urged that alleged confessions were used at their trial which had been extorted from them by state law enforcement officers in violation of the Fourteenth Amendment, and that they had been convicted solely and alone on the basis of these confessions. The issue raised was whether or not the petitioners' confessions were in fact freely and voluntarily made. The facts surrounding the statement of Ashcraft disclose that Ashcraft, a man of excellent reputation in the community, was first interviewed by investigative officers at about 6 o'clock p.m. on the day of his wife's murder as he was returning home from work. Informed by the officer of the tragedy, he was taken to an undertaking establishment to identify his wife's body. From there, he was taken to the county jail, where he conferred with the officers until about 2 o'clock a.m. This initial conference was of approximately eight hours' duration. No clues of ultimate value came from the conference. During the following week, the officers had further conferences with Ashcraft on several occasions, but no tangible evidence pointing to the identity of the murderer was forthcoming.

In the early evening of June fourteenth, the officers again came to Ashcraft's home and took him into custody. They thereupon took him to a room on the fifth floor of the county jail. The room was equipped with numerous items of crime detection paraphernalia, such as a finger-printing outfit, cameras, highpowered

lights, and such other devices as might be found in a homicide investigating office. The officers placed Ashcraft at a table in this room with a light over his head, and began to quiz him. The officers questioned Ashcraft in relays until the following Monday morning at approximately 9:30 or 10:00 o'clock. Ashcraft did not leave the room from Saturday evening at 7 o'clock until Monday morning at 9:30 or 10 o'clock, his detention incommunicado therefore being for a period exceeding two nights and one day. The grilling of Ashcraft was directed at him on the assumption that he was the murderer. In the interim, Ware having made an incriminating statement, this statement was read to Ashcraft at approximately 6 o'clock a.m. on Monday morning, and at approximately 9:30 a.m. Monday morning, Ashcraft's answering statement was read to him. Upon this phase of voluntariness of Ashcraft's statement, the Supreme Court of the United States states at page 153:

"Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all. Ashcraft, a citizen of excellent reputation was taken into custody by police officers. Ten days' examination of the Ashcraft's maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associates likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced

investigators, and highly trained lawyers questioned him without respite. From the beginning of the questioning at 7 o'clock on Saturday evening until 6 o'clock on Monday morning Ashcraft denied that he had anything to do with the murder of his wife. And at a hearing before a magistrate about 8:30 Monday morning Ashcraft pleaded not guilty to the charge of murder which the officers had sought to make him confess during the previous thirty-six hours."

Further, the Court at page 154 in characterizing the situation to be inherently coercive, states:

"We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a 'voluntary confession'."

It is respectfully submitted that the facts in the *Ashcraft* case and in the instant appeal differ in such material respect that there can be no reasonable comparison upon the question of compulsion or voluntariness between the two. Ashcraft was a suspect together with others. In the instant appeal, the appellant was the sole subject of investigation, as a taxpayer, his wife not being a party to any phase of the

criminal proceedings. The time of detention in the *Ashcraft* case varies to such a great extent from the instant case that, it is respectfully submitted, the time element cannot be considered. The petitioner Ashcraft was held incommunicado on the fifth floor of a county jail in a room which by its very nature indicated that its use was that of prolonged and determined *loci* of questioning in cases of homicide investigation. Ashcraft was placed at a table with a light over his head and became the subject of quizzing. This quizzing was accomplished in relays by the enforcement officers for extended periods of time over a period of two nights and a day and portion of a morning. It is respectfully submitted that in the factual circumstances of the *Ashcraft* case the appellee—by way of reiteration in those circumstances not disputing the holding therein—again respectfully submits that upon the factual differentiation alone between the two cases that the facts in the instant appeal are not analogous in any degree to those of the *Ashcraft* case.

It is too well settled to require the citation of authorities that a confession—assuming Plaintiff's Exhibits "M", "N" and "O" in the instant appeal to be such—which is not voluntarily made is not admissible. In the instant appeal, the interviews reduced to writing were the representations of the appellant upon matters contained in his return, and, it is submitted, voluntarily tendered as evidence as disclosed by the chronological events set forth herein (*supra*).

It is respectfully submitted that, in addition to any self-incriminating statements contained in Plaintiff's Exhibits "M", "N" and "O" the record in this matter is replete with testimony and documentary evidence which amply corroborates and proves all elements of the offense charged herein, sufficient in nature to warrant the conviction of the appellant in the trial Court in addition to the exhibits in question. This being so, it is submitted that in this Honorable Court's independent consideration of the issue raised in the instant specification upon the voluntariness of Plaintiff's Exhibits "M", "N" and "O" that any incriminating statements contained therein are thereby rendered nonprejudicial insofar as proof of the plaintiff's case is concerned relative to the essential elements of the offense charged. It is respectfully submitted that this alternative consideration in itself sustains the theory of the appellee upon the intent specification and upholds its contention that Plaintiff's Exhibits "M", "N" and "O" were in fact voluntarily made, were the subject of proper foundation at the time of trial—assuming the exhibits to constitute confessions—and are nonprejudicial by their very nature in view of the corroborative evidence of record.

SPECIFICATION OF ERROR NO. 7.

Specification of Error No. 7 is directed at the alleged error of the trial Court in overruling appellant's motion to strike certain questions and answers in Plaintiff's Exhibit "M".

By way of completion of the record relative to the alleged error raised by Specification of Error No. 7, the appellee adverts to a further question asked of the taxpayer at the time of the original interview. (R. p. 235):

"Q. Did you plead guilty?

A. Pleaded guilty."

It is respectfully submitted that the foregoing addition completes the relevant representations made by the taxpayer upon the issue in question.

It is noted at the outset that the issue raised by the instant Specification of Error, No. 7, is directed to certain brief questions and answers which constitute a portion of Plaintiff's Exhibit "M", said exhibit being the sworn statement of the appellant taken at the time of his interview by Agent Krause. The questions and answers constitute inquiry into the prior criminal activities, if any, of the appellant. It is respectfully submitted that the questions and answers being by way of examination of the taxpayer-appellant and the examination being subsequently reduced to a writing, that the rules of law in respect of cross-examination of a witness or of a defendant who testifies in his own behalf, do not apply to the

issues raised in this specification. However, by way of answer to the claim of alleged error in respect of that portion of the appellant's statement complained of, appellee respectfully submits that the overruling of the motion to strike was not error.

It is respectfully submitted that every element of the offense charged in the indictment was proved beyond reasonable doubt by the evidence in the Court below. The record on appeal amply supports this.

The error alleged is relative to prior convictions of the appellant, queries as to which the appellant readily answered. It is to be noted that appellant's prior criminal convictions consisted of minor violations save and except a conviction involving narcotics for which the defendant was sentenced to pay a fine of one hundred dollars and given a five-year suspended sentence. The convictions in themselves, save and except the narcotics conviction, are not of such magnitude, it is respectfully submitted, as would sway the deliberation or conscience of a jury in arriving at a determination of guilt or innocence upon trial. It is only glaring and obviously harmful error resulting in miscarriage of justice, which warrants reversal.

Substantial and prejudicial error must not only be alleged but must be proven. To constitute substantial prejudicial error warranting reversal, the entire record of proceedings must be scrutinized to determine the extent or degree of miscarriage of justice or the substantial aspect of any alleged error. If these factors are present, they must, in addition to the fore-

going result in the denial of a fair trial to the defendant. No reversal may be had for alleged error in the admission of evidence which is clearly not prejudicial, although the evidence in itself may be irrelevant or immaterial. It is respectfully submitted that the following cases substantiate the contention of the appellee with reference to Specification of error No. 7:

Berger v. United States, 295 U.S. 78, 81:

“Section 269 of the Judicial Code, as amended (28 U.S.C. §391) provides:

“ ‘On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.’ ”

* * * * *

“Evidently Congress intended by the amendment to §269 to put an end to the too rigid application, sometimes made, of the rule that error being shown, prejudice must be presumed; and to establish the more reasonable rule that if, upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. See *Haywood v. United States*, 268 Fed. 795, 798; *Rich v. United States*, 271 Fed. 566, 569-570.”

Myers et al. v. United States, 223 Fed. 919, 925:

“This particular fraud was not only proved, but was proved in such a way that no help was needed from the instances of other false statements with which the record is filled. It was proved by

Defendant's own circulars, by their signed letters, by their admissions on the stand, by their counsel's admissions on the trial, and, indeed practically in this court, because nowhere in the brief of 115 pages is there a single suggestion that they did not unload their own personal holdings on persons whom they induced to believe that they were purchasing treasury stock. With this controlling fact clearly established, it is idle to discuss whether any other misleading representations were or were not made, or what the prospects of the various properties were, or whether some particular bit of evidence might induce a belief that defendants were unprincipled men. Irrespective of all the other testimony, and with the conceded facts before them as to sale of stock falsely alleged to be 'treasury stock', the jury would be bound to find that defendants had devised a scheme to defraud, if they were intelligent and conscientious . . .

* * * * *

"... Every element of the statutory offense had been proved and stands practically undisputed. Under such circumstances only some glaring and obviously harmful error would justify a reversal."

Baish v. United States, 90 F. (2d) 988, 991:

"Without deciding whether the questions were proper, it is enough to say that there is nothing in the record to indicate remotely that they were propounded with deliberate or preconceived impropriety or in bad faith; and it is manifest that the rights of appellant were not prejudiced. A conviction will not be disturbed where the whole record fails to disclose substantial prejudice. *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L.Ed. 1314."

Salerno v. United States, 61 F. (2d) 419, 424:
 “ . . . Since the enactment of section 391, Title 28, U.S.C.A., an error is not, however, presumed to be prejudicial. The burden of showing prejudice is upon the appellant, and he is not entitled to the reversal of a judgment of conviction, unless it appears that he was denied some substantial right and thereby prevented from having a fair trial. *Rich v. United States* (C.C.A. 8) 271 F. 566; *Trope v. United States* (C.C.A. 8) 276 F. 348; *Hall v. United States* (C.C.A. 8) 277 F. 19; *Horning v. District of Columbia*, 254 U. S. 135, 41 S. Ct. 53, 65 L.Ed. 185; *Hermansky v. United States* (C.C.A. 8) 7 F. (2d) 458, 460; *Furlong v. United States* (C.C.A. 8) 10 F. (2d) 492; *Miller v. United States* (C.C.A. 8) 21 F. (2d) 32.”

* * * * *

“In *Apt v. United States*, 13 F. (2d) 126, 127, this court, after having severely criticized the method of the United States Attorney in cross-examining the defendant, said:

“ ‘If it were probable the cross-examination had prejudiced the jury against the defendant to the extent of influencing their verdict, it would be the duty of the court to reverse the verdict in the interest of justice. But this cross-examination, though improper, could not have been prejudicial. The connection of the defendant Apt with the conspiracy charged in the indictment was so clearly shown, and the verdict of the jury such a righteous one, that it would be a miscarriage of justice to reverse it on account of this indefensible cross-examination.’ See, also, *Hall v. United States* (C.C.A. 8) *supra*, and *Miller v. United States* (C.C.A. 8) *supra*.

“In view of the abundance of competent evidence in this case to justify the conviction of McDonald, and in view of the conviction of Caniglia and Salerno upon virtually the same evidence, we have reached the conclusion that we would not be justified in holding that the improper cross-examination of McDonald deprived him of a fair trial or constituted reversible error.”

That a judgment of conviction in a criminal case will not be reversed because of the admission of evidence which was clearly not prejudicial to a defendant, although it may have been irrelevant or immaterial, is well established.

Sawyer v. U. S., 26 S. Ct. 575, 202 U.S. 150;

Dimmick v. U. S., 116 F. 825, 54 C.C.A. 329, affirming, D. C. 1901, *U. S. v. Dimmick*, 112 F. 350, and certiorari denied, 1903, *Dimmick v. U. S.*, 23 S. Ct. 850, 189 U.S. 509, 47 L.Ed. 923;

Miller v. U. S., 4 F. 2d 228, certiorari denied 45 S. Ct. 511, 268 U.S. 692, 69 L.Ed. 1160;

Brown v. U. S., 142 F. 1, 73 C.C.A. 187;

Thompson v. U. S., 144 F. 14, 75 C.C.A. 172;

Tubs v. U. S., 105 F. 59, 44 C.C.A. 357.

It is respectfully submitted that the foregoing authorities sustain the applicable law in respect of the issues raised in Specification of Error No. 7 and that the overruling of the appellant's motion to strike that portion of the statement complained of was not error.

7.

SPECIFICATION OF ERROR NO. 8.

Specification of Error No. 8 urges error in the giving of the United States Instruction No. 6 as modified.

Inasmuch as United States Instruction No. 6, save and except the first portion thereof, which portion is merely preliminary in nature, is a restatement of Section 29.51-2 of Regulation 111 of the Bureau of Internal Revenue, United States Treasury, having the force and effect of law, and in further view of the discussion and contention of the appellee with respect of the law governing the form of return discussed in sub-paragraph 1 of the argument covering Specification of Error No. 1 and Specification of Error No. 2 herein and of the characterization by the appellee that the points of law raised herein are the same involved under Specification of Error Nos. 1 and 2, the appellee rests upon the argument, contentions and authority cited in subparagraph 1 of this, his argument, in reply and answer to Specification of Error No. 8. The appellee in answer to Specification of Error No. 8 reiterates all argument and points and authorities cited in Subparagraph 1 of this, its Argument.

SPECIFICATION OF ERROR NO. 9.

Specification of Error No. 9 alleges error in the giving of United States Instruction No. 19.

United States Instruction No. 19 is a statement of the law of the Territory of Hawaii relative to Tanamoshis. (R. p. 84.) Tanamoshis are joint ventures or enterprises of a financial nature peculiar to certain Oriental races within the Territory of Hawaii. The appellee knows of no other geographical area wherein Tanamoshis are engaged in. Tanamoshis were introduced in Hawaii after the influx into the Territory of large numbers of members of these Oriental races. It is not even generally known within the Territory of Hawaii what the precise terms of a Tanamoshi are, or whether all Tanamoshis are alike in all of their terms. Insofar as the law of contracts or contractual obligations pertains or governs them, the terms of one may not be the same as the terms of another, and for this reason the courts cannot take judicial notice of the terms of such enterprises or contracts.

Briefly, a Tanamoshi constitutes a joint enterprise or venture in which an agreed sum of money is paid into the hands of a promoter or "boss" of the Tanamoshi, to the end that the total thereof may be loaned to any member—save and except the "boss"—at a rate of interest agreed upon. At such time as sufficient contributors indicate a willingness to enter into and form a Tanamoshi, each member thereupon orally obligates himself to pay a stipulated sum

toward the total sum for a stipulated number of months. The promoter or Tanamoshi "boss" as a rule has the privilege of receiving the money contributed at the first meeting without bidding therefor or without paying any commissions, interest or premium thereon. At each successive monthly meeting, each member contributes the stipulated sum, which sum is loaned to the contributing member who bids the highest amount of interest to be paid for the loan. The interest rate therefore, is a flexible one, depending upon the desirability of a member attempting to secure the loan and is limited only by the percentage of interest which the successful bidder bids in the sum. Accessibility of the sum by way of a loan can be a great convenience to the highest bidder, while at the same time each and every member of the Tanamoshi over the stipulated period of time, repays the amount of his loan and as an eventuality pays merely the interest thereon at the rate of his successful bid.

Whether or not Tanamoshi enterprises are in fact loans or joint contributions in the nature of loans is immaterial for purposes of the instant appeal. Ten individual witnesses on behalf of the appellee testified at the trial relative to alleged Tanamoshis or loans to, by, or with the appellant. The record discloses that one of the defenses of the appellant upon trial was that moneys held by him and which were not reported nor referred to in the income tax returns for the years in question were Tanamoshi moneys. The testi-

mony of the ten witnesses in behalf of the appellant was obviously calculated to establish that any Tanamoshi moneys held or in possession of the appellant were realizations by way of capital and not income.

A brief reference to the testimony of the ten witnesses introduced for this purpose in behalf of the appellant—omitting preliminaries and identification—reflects the following:

Witness: Myung Woo Lee:

That the witness had financial dealings with the defendant in 1942, and that the financial dealing was Tanamoshis in the amount of \$1,150.00. (R. p. 320.)

Witness: Duk Bong Park:

That the witness in 1942 had financial dealings with the appellant by way of giving him \$330.00 in a Tanamoshi, and in 1943 the witness gave him \$760.00 by way of Tanamoshi moneys. (R. p. 320.)

Witness: Hyeng Goo Kim:

That the witness had financial dealings with the appellant in 1942 in a Tanamoshi case in which he took out \$900.00. In 1943, the witness had dealings with the appellant in the sum of \$2,200.00 (R. p. 322.)

Witness: Young Soon Lee:

That the witness loaned the appellant \$1,150.00 in 1942. (R. p. 323.)

Witness: Kyung Ai Cho:

That the witness loaned or gave the appellant \$1,600.00 in 1942 and loaned him \$1,250.00 in 1943 as Tanamoshi loans. (R. p. 324.)

Witness: Mary Chung:

That the witness loaned the appellant \$1,050.00 in 1943 as a Tanamoshi loan. (R. p. 325.)

Witness: Arthur S. Tai:

That the witness loaned the appellant \$1,000.00 in 1943 but the same was not a Tanamoshi loan. The loan was a personal one. (R. p. 326.) No security or collateral for the loan was taken by the witness, nor promissory note or other document executed. (R. p. 327.) The appellant was to repay the amount in a lump sum four or five months after the loan. (R. p. 328.) The loan was not a Tanamoshi loan. (R. p. 329.)

Witness: Chin Kan Yue:

The witness gave the appellant \$1,000.00 in 1943 which was a loan and not upon the Tanamoshi basis. (R. p. 330.) This loan was repaid to the witness the same year and was not a Tanamoshi loan in nature. (R. p. 331.)

Witness: Ah Che Park:

In 1943 the witness loaned the appellant \$1,000.00 which was not a Tanamoshi loan. The loan was repaid the same year. (R. p. 332.)

Witness: P. Y. Hong:

In 1943 the witness loaned the appellant \$2,000.00 due to Tanamoshis in a Tanamoshi enterprise. (R. p. 334.)

The appellant urges that United States Instruction No. 19 which quotes the law of the Territory of Hawaii in respect to Tanamoshis as applies to the instant case, instructs the jury in effect that the burden of proof has shifted to the defendant. It is respectfully submitted that this interpretation and construction in no way is warranted under any interpretation of its context. It is noted that appellant urges that the instruction is misleading and unduly prejudicial in that it "may" give the jury the wrong impression as to the burden of proof. The question of Tanamoshis was injected into the trial court proceedings by way of defensive matter on behalf of the defendant. It is respectfully submitted that in no logical interpretation of the instant Instruction can it be reasonably concluded that any question relative to Tanamoshis was a portion of the case in chief of the plaintiff, or that matters relative to Tanamoshis being an essential element of the offense charged that the plaintiff failed to establish such fact or facts and that the instruction ergo was misleading and prejudicial in that it created the impression upon the minds of the jurors that it was incumbent upon the appellant to meet that issue.

The first two sentences of United States Instruction No. 19 are taken verbatim from the case of *Choi Heylin v. Shin Sung Yil*, 30 Hawaii 606, pages 608-609:

“We do not know, and it is not generally known in this community, what the precise terms of a Tanamoshi are or whether all Tanamoshis are necessarily alike in all of their terms. Insofar as the law of contracts goes, the terms of one Tanamoshi may not be the same as the terms of another Tanamoshi. The courts cannot take judicial notice of the terms of such enterprises or contracts.”

The last sentence of the instruction, “The burden is upon the defendant to substantiate the testimony offered by him as to Tanamoshi enterprises to establish at least a prima facie case of a loan to him.” is the law upon the subject as established by the *Heylin* case, *supra*.

It is respectfully submitted that in view of the introduction at the trial of the testimony of the ten witnesses above referred to relative to alleged Tanamoshi dealings, the defendant upon trial did not establish a prima facie agreement or any facts of a loan by way of a Tanamoshi enterprise. It is to be noted that none of the testimony of any of the ten witnesses above quoted recited any particular dates, conditions of contribution, conditions of repayment, rates of interest, successful bidders, the names of other members of the Tanamoshi, the number of members of the Tanamoshi, or any testimony or detail whatsoever which, insofar as the law of contracts requires, would establish the relationship in law of

debtor and creditor. These factors are absent in the testimony of each and every witness, and for this reason it is respectfully submitted the mere recitation of a loan, a loan by way of Tanamoshi enterprise, or a repayment of a loan does not, under the law as enunciated in the *Heylin* case, *supra*, satisfy the requirements necessary to establish the existence of a Tanamoshi. The testimony of the ten witnesses in effect merely announced past financial dealings with the appellant, some by way of loan, some by way of Tanamoshi enterprise. Some of the witnesses testified as to repayments. In the circumstances it is submitted that none of the testimony of any of the ten witnesses was sufficient to establish a Tanamoshi enterprise in fact.

In view of the peculiar nature of Tanamoshi enterprises, authority upon the law relative thereto is scarce. It is conjectured that the case of *Choi Heylin v. Shin Sung Yil*, 30 Hawaii 606 (*supra*), is the only authority of record upon the point. This case was decided by the Supreme Court of the Territory of Hawaii on October 12, 1928. It was an action of assumpsit wherein the plaintiff claimed of the defendant the sum of \$92.05 as balance due for moneys loaned and advanced by the plaintiff to and for the said defendant. The undisputed evidence showed that the plaintiff, being desirous of obtaining a loan, organized an enterprise known as a Tanamoshi, composed of twenty-one members, each of whom was to pay the sum of \$20.00 per month for a period of twenty-one months. The plaintiff, as promoter or "boss" of the

Tanamoshi was to have the privilege of receiving the moneys contributed at the first meeting without bidding or paying any commissions therefor or any interest or premium, and did accordingly receive the sum of \$420.00 at the first meeting, which sum was contributed by the twenty-one members at twenty dollars apiece. At each succeeding monthly meeting the \$420.00 contributed was to be loaned to the member bidding the highest amount—termed interest—that is to say, a sum of money to be paid by the successful bidder to each of the members at the time of the meeting who had not yet received a loan from the association. At the meeting some three months after organization of the Tanamoshi, the defendant was successful as the highest bidder who had not yet received a loan and at that meeting the members paid \$20.00 apiece and plaintiff added \$80.00 to the amount contributed, making a total contribution of \$420.00. Subsequently, the defendant paid to the plaintiff sixteen installments of \$20.00 each on account of the loan of \$420.00 which he had received, and after being credited with a minor credit, left a balance of \$92.05 which the defendant had not paid to the plaintiff or to anyone else by way of reimbursement. The Court in holding first, that it could not take judicial notice of the terms of Tanamoshi enterprises or contracts and, second, that the burden was upon the plaintiff to establish at least a prima facie case of a loan to the defendant, stated at pages 608-609:

“ . . . There was no evidence before the court tending to support a finding that the \$420 which

the defendant received in January, 1926, was loaned to him by the plaintiff or a finding that the plaintiff was a trustee for the other persons who joined here in contributing the moneys which were loaned to the defendant. So far as we know 'tanamoshis' are enterprises peculiar to certain Oriental races only and were introduced in Hawaii only after the coming of considerable numbers of the people of those races. We do not know, and it is not generally known in this community, what the precise terms of a tanamoshi are or whether all tanamoshis are necessarily alike in all of their terms. Insofar as the law of contracts goes, the terms of one tanamoshi may not be the same as the terms of another tanamoshi. The courts cannot take judicial notice of the terms of such enterprises or contracts . . .

* * * * *

"The burden was upon the plaintiff to establish at least a *prima facie* case of a loan by her individually to the defendant. This she failed to do . . ."

It is respectfully submitted that the law relative to Tanamoshi enterprises as the same was limitedly injected by way of defense in the lower Court in the instant proceedings—sustains the contention of the appellee in respect of the alleged error urged as to United States Instruction No. 19. It is further respectfully submitted—and in support thereof the appellee rests upon the arguments and authorities cited in subsection 6 of the argument herein, relative to appellant's Specification of Error No. 7—that the issue, if any, upon Tanamoshis herein and

the attending United States Instruction No. 19 given in connection therewith is of such relative inconsequence that it cannot be considered to in any manner have constituted harmful or prejudicial error resulting in substantial prejudice to the appellant or in his deprivation of a fair trial.

CONCLUSION.

It is respectfully submitted that the Trial Court did not commit error as to any of the Specifications of Error urged by the appellant, and that the judgment of the United States District Court for the Territory of Hawaii should be affirmed.

Dated, Honolulu, T. H.,

November 7, 1947.

Respectfully submitted,

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No. 11,381

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

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No. 11,381

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

This is an appeal from judgments of conviction of Hyman Stillman and Lou Segal, on Counts 1, 2, 3, 4, 5, 6, 12, 13, 32, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49 and 50 of an indictment charging *felony* conspiracy in Count 1, in violation of Title 18, Section 88, U. S. Code, and *misdemeanor* convictions in the other counts, in violation of Title 50, App. 901 *et seq.*, in violation of the Emergency Price Control Act of 1942 (not "as amended").

The defendants were indicted on March 11, 1946 [R. 2], and found guilty on July 2, 1946. [R. 47, 48.] Judgments were pronounced against them as to Count 1 of a fine of \$3000.00 and one year imprisonment [R. 55]. and \$750.00 and six months imprisonment (jail sentence) on each of the succeeding counts, to run concurrently, or a total of \$19,500.00 as to each defendant on each of the counts in the indictment.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225, U. S. Code, and by the Emergency Price Control Act of 1942, Title 50 App., Section 925.

Statutes and Regulations Involved.

The Emergency Price Control Act of 1942, Title 50 App., Section 901 *et seq.* and Maximum Price Regulations 148, 165, 169 and 239.

THE SPECIFICATION OF ERRORS.

Questions Presented by This Appeal.

I.

The indictment fails to state an offense against the laws of the United States. The Court erred in overruling the motions to dismiss and the motion in arrest of judgment.

The indictment was void because it charged a felony conspiracy and a misdemeanor conspiracy in the same indictment. They were inconsistent with each other. This nullifies the indictment.

The indictment was void because it alleges on its face that it was not brought by a legally constituted and then existing grand jury.

The verdicts were contrary to the law and the evidence.

II.

The indictment erroneously charges a felony conspiracy based upon a statute which permits only misdemeanor prosecutions. The joining of the felony and misdemeanor prosecutions in the same indictment was prejudicial error, and in violation of the congressional mandate.

III.

The District Court erred in the admission and exclusion of evidence in the case. It was prejudicial error to admit the defendants' income tax statements.

IV.

Title 26, Section 55, U S. Codes, inherently and as construed and applied in this case as well as the regulations issued pursuant thereto are unconstitutional and in violation of defendants' rights under the Fourth and Fifth Amendments to the United States Constitution.

V.

The Court erred in admitting into evidence the income tax statements of the defendants without proper authorization as required by law.

VI.

The Court erred in the admission of statements taken by law as confidential and which statement constituted compelled testimony, the use of which is forbidden by the Fifth Amendment to the Constitution of the United States.

VII.

The Court erred in overruling the motion to dismiss on the grounds that the indictment was indefinite, uncertain and violated the Sixth Amendment to the Constitution of the United States in that it failed to set forth facts which apprised the accused of the nature and cause of the offense.

VIII.

The Court erred in denying a Bill of Particulars.

IX.

The Court erred in holding that there was jurisdiction to pronounce judgment on the statute which had expired and no regulations which had also ended.

X.

The Court erred in restricting cross-examination of certain witnesses.

XI.

The Court erred in admitting certain invoices in evidence.

XII.

The Court erred in certain instructions given.

XIII.

The Court erred in declining to sustain motions in arrest of judgment.

I.

The Indictment Was Void Because It Charged a Felony Conspiracy and a Misdemeanor Conspiracy in the Same Indictment. They Were Inconsistent With Each Other. This Nullifies the Indictment.

Count 1 of the indictment charges the defendants with a felony conspiracy. It sets forth as part of the felony conspiracy the overt acts, most of the acts charged in the subsequent counts, which charged a conspiracy of a misdemeanor nature.

This is the situation which was condemned in *Pinkerton v. United States*, 328 U. S. 640, wherein the Court said, 90 L. Ed. 1494, 328 U. S. 643:

“There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime.”

This is the identical situation which was contained in *Goldsmith v. United States* and *Blumenthal v. United States*, *Weiss v. United States*, *Feigenbaum v. United States*, now pending before the Supreme Court of the United States on certiorari, in cases Nos. 1162, 1163, 1164, 1165, and set for argument in the October term of the Court. We think that the indictment could not be drawn to charge both felony conspiracy and misdemeanor conspiracy, which would affect the charging of a conspiracy to conspire, and that this situation necessarily requires a reversal of the judgment.

Such a similar construction has been placed upon the law in *United States v. Kissel*, 174 Fed. 823, 825; *United States v. Patterson*, 201 Fed. 697, 723. In the Sherman Anti-Trust Act Cases: In *United States v. Kissel*, 173 Fed. 823, 825, the Court said:

“This indictment is necessarily brought under the provisions of the Sherman Act * * * nor could this indictment be brought under Sec. 5440 of the U. S. revised statutes because there is no law of the U. S. making a conspiracy in restraint of trade or to monopolize trade, an offense against the U. S. except the Sherman Act and it cannot be a conspiracy to engage in a conspiracy.”

Section 205B of the Emergency Price Control Act denounces as a misdemeanor any violation of Section 4 of the Emergency Price Control Act, which makes it an offense as follows:

“It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into for any person to sell or deliver any commodity . . . in violation of any . . . price schedule effective in accordance with provision of Section 206 . . . or to offer, solicit, or to agree to do any of the foregoing.”

Thus the Emergency Price Control Act denounces as a substantive offense a conspiracy to violate a regulation of an administrator regarding a price. The words “agreement” and “conspiracy” in criminal law are synonymous—to conspire is to agree. *Morrison v. California*, 291 U. S. 82; *Marcenty v. United States*, 49 F. (2d) 156; *Wright v. United States*, 108 Fed. 805; *United States v. Sager*,

49 F. (2d) 725; *Morris v. United States*, 34 F. (2d) 839; *United States v. Katz*, 271 U. S. 354, 7 L. Ed. 986; *Gibaldi v. United States*, 287 U. S. 119, 77 L. Ed. 209. The Emergency Price Control Act presents a declared intention of Congress to make conspiracies to violate the Emergency Price Control Act a misdemeanor. It was clearly Congressional intent to withdraw such offenses from the classification of felony.

II.

The Indictment Was Void on Its Face.

The indictment was returned March 11, 1946. [R. 2.]
The indictment alleges:

“Grand Jurors of the United States of America, being duly impaneled, sworn and charged in the District Court for the Southern District of California, Central Division, in the September, 1945, Term of this Court, having begun but not finished during the said September Term of Court, among other things, the matter of the investigations charged in this indictment, and having continued to set by the order of this Court in and for the said District during the February, 1945 Term to complete inquiries begun, but not finished, at the original term, and inquiring for that District, upon their oaths find and present as follows:”

The indictment was presented on oath of the grand jury as a true and correct copy of the indictment and was signed,

“A true bill. John D. Boyle, Foreman.” [R. 126.]

It was filed March 11, 1946. This was long after the term of court in February, 1945 and the power and authority of the grand jury under its own oath had expired. The indictment was therefore void. Objection was made to the indictment on account of the fact that it was brought after the term of court in which it was lawfully constituted. [R. 86.] The Court overruled the objections and allowed an exception to the defendants. [R. 87.] As stated in *United States v. McKay*:

“A United States District Court is a court of limited jurisdiction with only such powers as are specially conferred by statute.

“The grand jury sitting in a United States District Court is strictly a creature of statute, and there is no such thing as a *de facto* grand jury in the federal court.

“The original life of grand jury and its authority to act and any continued existence which it may have after expiration of term for which it was impaneled depends strictly on statutory authority, and unless that authority is complied with there is no jurisdiction to return an indictment.

“Here we must take the indictment on its face under the solemnity with which it was returned and the indictment shows on its face that there was no authority to return it at the time mentioned, and it shows on its face that it purports to be returned by the grand jury either sitting in the 1945 term when it was without jurisdiction to sit, or beyond that term when there is no jurisdiction alleged in the indictment.”

The indictment, therefore, is void on its face and all proceedings subsequently had are void. An indictment must be accepted as a true document. It cannot be altered either on its face or by any other means which would have the effect of altering its contents.

United States v. Carney, et al., No. 11001, Ninth Circuit Court of Appeals.

III.

The Court Erred in Refusing to Dismiss the Indictment on the Ground that:

1. It failed to state an offense against the laws of the United States, and

2. It consisted of a series of conclusions of the pleader and failed to descend to particulars as required by the sixth amendment to the Constitution of the United States. [R. 26, 27.] There was a demand made for a bill of particulars [R. 28 *et seq.*] upon which we will touch a little later.

The indictment charged in very general terms conclusions of the pleader that prices would be charged "in excess of the maximum price permitted under the Emergency Price Control Act of 1942, and applicable regulations promulgated thereunder, including Maximum Price Regulation No. 165." [R. 4.] Paragraph b charged that defendants would refuse and cause others to refuse to render slaughtering services to any prospective purchasers of such services unless prices were paid therefor which were in excess of the maximum prices permitted under the aforesaid Emergency Price Control Act of 1942, and of the aforesaid Maximum Price Regulation No. 165. [R. 4.] Each of the paragraphs in the con-

spiracy count of the indictment charged such general terms. The substantive counts allege that the defendants charged in excess of the maximum prices pursuant to a regulation therein specified, but did not specify the price charged. Throughout the indictment these same general conclusions of the pleader were mentioned without descending to particulars. Demand for Bill of Particulars demanded particulars as to the regulation in particular charged with being violated and a demand for a specification of the price alleged to have been charged and the date of the charge and the person to whom the charge was made. [R. 28.] The name of any prospective purchaser to whom any of the defendants refused slaughtering services and the alleged price or prices which it was claimed were requested for such services. The demand for a bill of particulars specified the number of the regulation particularly with which the indictment was lacking in its allegation. This was also refused. [R. 32.]

The Sixth Amendment to the Constitution of the United States requires that an indictment descend to particulars as to the nature and cause of the accusation.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

United States v. Hess, 124 U. S. 483, 31 L. Ed. 516;

Foster v. United States, 253 Fed. 481;

Miller v. United States, 288 Fed. 817;

Sixth Amendment to the Constitution of the United States.

“A defendant is entitled to particulars as to times, places, persons present and other data necessary to make his defense.”

Rules of Criminal Procedure (new), Rule 7, subdivision (f);

Glasser v. United States, 315 U. S. 60, 86 L. Ed. 680.

Without these particulars the defendant was deprived of his constitutional right to know the nature and cause of the accusation and to have the exact facts which he was called upon to meet at the trial.

(c) The motion to dismiss should have been granted for another reason. Cattle and meat are an agricultural product and any price regulation which affected it had to be approved first by the Secretary of Agriculture.

The failure of the indictment to specify that the regulations herein involved, to-wit: 148, 165, 169 and 239 of Maximum Price Regulations, failed to specify an offense against the United States, since before such regulations could be violated as affecting the defendants, they had to be approved by the Secretary of Agriculture, and the indictment had to so state if it involved a fine after 1945 and could be legally considered as having done so.

EMERGENCY PRICE CONTROL ACT OF 1942.

(d) The motion to dismiss should also have been granted for the reasons that the indictment only specifies a violation of the Emergency Price Control Act of 1942 and regulations thereunder. The Emergency Price Control Act of 1942 expired in 1943. It was only the amendments thereunder that could possibly apply. The indictment does not specify the Emergency Price Control Act of 1942 *as amended*, but only the Emergency Price Con-

trol Act of 1942, which had long expired and there were no applicable regulations under the Emergency Price Control Act of 1942 expiring in 1943, which affected these defendants as to acts occurring in 1944 and 1945 and for which no indictment had been returned until March 11, 1946. [R. 2.]

United States v. Chambers, 291 U. S. 217;

United States v. Hark, 320 U. S. 531, 88 L. Ed. 290.

III.

The Indictment, Furthermore, Did Not Charge An Offense.

The indictment and each count charged violation of the Emergency Price Control Act of 1942. That Act expired in 1943 and prior thereto Maximum Price Regulations 148, 165, 169 and 239 were promulgated. Each of the counts bears the same fatality.

No allegation is made in the indictment that it relates to the Emergency Price Control Act of 1942, "as amended." Therefore the statute's power and regulations under it expired.

U. S. v. Chambers, 291 U. S. 217;

U. S. v. Hark, 320 U. S. 531, 88 L. Ed. 290.

The court erroneously instructed the jury as to what the Emergency Price Control Act of 1942 "as amended" provided; but the indictment only alleged the Emergency Price Control Act of 1942. It was not within the power of the court to amend the indictment either by adding anything to it directly or by way of an instruction.

Ex Parte Bain, 120 U. S. 1;

Edgerton v. United States, 143 F. (2d) 697;

United States v. Carney, decided Aug. 22, 1947,
No. 11001, Ninth Circuit Court of Appeals.

IV.

The Court Erred in the Admission of Income Tax Returns, Without the Specific Approval of the Secretary of the Treasury or An Order of the President.

Title 26, Section 55, U. S. Codes and Treasury Regulations TD4945, §463D4, §463D5, TD4929, §463C34, §463C36, §463C37, §463C35, §45831, 45833, 45834, 45836, 45838, 45839, §45890, and 458.64, inherently and as construed and applied in this case are unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States in that although the statements are compelled through the authority of law the statute does not grant immunity for use of these compelled statements as broad as the provisions of the Fifth Amendment to the Constitution of the United States.

Counselman v. Hitchcock, 142 U. S.

**Income Tax Returns—Inspection—Obtaining Copies
—and Use of Returns in Litigation.**

Title 26, Internal Revenue Code (same as U. S. C.), Section 55, contains the authority for rules and regulations concerning inspection of income tax returns, etc. It provides in part as follows:

“Section 55. PUBLICITY OF RETURNS.

(a) Public record and inspection.

(1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President, and under rules and regulations prescribed by the Secretary and approved by the President.

(2) And all returns made under this chapter, subchapters A, B and D of chapter 2, subchapter B of chapter 3, chapters 4, 7, 12 and 21, subchapter A of chapter 29, and subchapters A and B of chapter 30, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Commissioner with the approval of the Secretary. The Commissioner may prescribe a reasonable fee for furnishing such copy."

The following sections of Treasury Decisions 4945 and 4929, promulgated pursuant to the authority contained in Section 55 of the Internal Revenue Code, set up the procedure to be followed to inspect or obtain copies of income tax returns:

"T. D. 4945, Section 463D.4 (CCH. Par. 517).
USE OF RETURNS IN LITIGATION.—The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent the publicity neces-

sarily results from such use. The original return will be furnished only in exceptional cases, and then only if it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished if the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto.

T. D. 4945, Section 463D.5 (CCH. Par. 518). FURNISHING OF COPIES OF RETURNS.—A copy of a return may be furnished to any person who is entitled to inspect such return upon written application therefor and the submission of evidence satisfactory to the Commissioner of his right to receive the same, except that if a return is in the custody of a collector or of an internal revenue agent in charge or the head of a field division of the Technical Staff, such collector or agent in charge may furnish a copy of such return to a United States Attorney or an attorney of the Department of Justice, or to the taxpayer or his duly authorized attorney in fact, in accordance with these regulations. Certified copies will be furnished only upon specific request therefor sent to the Commissioner at Washington.

T. D. 4929, Section 463C.34 (CCH. Par. 505). INSPECTION BY GOVERNMENT ATTORNEYS.—Any return shall be open to *inspection* by a United States Attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for *inspection* shall be in writing and, except as provided in section 463C.37, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant

to the Attorney General, and Assistant Attorney General, or a United States Attorney.

T. D. 4929, Section 463C.36 (CCH. Par. 507).
PLACE OF INSPECTION.—Generally, returns may be inspected only in the Bureau of Internal Revenue, Washington, D. C., unless such returns are in the custody of a collector of internal revenue or internal revenue agent in charge of the head of a field division of the Technical Staff, in which event the returns may be inspected in the office of such collector or agent in charge or head of division, but only in the presence of an internal revenue officer, designated by the Collector or agent or head of division for that purpose.

T. D. 4929, Section 463C.37 (CCH. Par. 508).
APPLICATIONS FOR INSPECTION.—Except as provided in section 463C.33, and as hereinafter provided, all applications for permission to inspect returns must be made in writing to the Commissioner of Internal Revenue. When a return is in the custody of a collector of internal revenue or internal revenue agent in charge of the head of a field division or the Technical Staff, such collector or revenue agent in charge or head of division, upon written application to him, is authorized to permit the inspection of such return by a United States Attorney, or an attorney in the Department of Justice, or by the taxpayer or his duly authorized attorney in fact, in accordance with these regulations.

T. D. 4929, Section 463C.35 (CCH. Par. 506).
INFORMATION RETURNS.—Information returns, schedules, lists and other statements designed to be supplemental to, or to become a part of, the returns shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by these

regulations, the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return.”

Title 26—Internal Revenue, Chapter I, Code of Federal Regulations of the United States, states as follows:

“458.31 *Permission to inspect.* The Commissioner of Internal Revenue, upon written application setting forth fully the reasons for the request, may grant permission for the inspection of returns in accordance with the regulations in subpart.*” [Part. III, art. 1.]

“458.32 *Treasury Department officials and employees.* The officers and employees of the Treasury Department whose official duties require inspection of returns may inspect any such returns without making such written application. If the head of a bureau or office in the Treasury Department, not a part of the Internal Revenue Bureau, desires to inspect, or to have an employee in his bureau or office inspect a return, in connection with some matter officially before him, for reasons other than tax administration purposes, the inspection may, in the discretion of the Secretary, be permitted upon written application to him by the head of such bureau or office, showing in detail why the inspection is desired.” [Part III, art. 2.]

“458.33 *Inspection by branch of Government other than Treasury Department.* Except as provided in sec. 458.34, if the head of an executive department (other than the Treasury Department), or of any other establishment of the United States Government, desires to inspect or to have some other of-

ficer or employee of his branch of the service inspect a return in connection with some matter officially before him, the inspection may, in the discretion of the *Secretary of the Treasury*, be permitted upon written application to him by the head of such executive department or other Government establishment. The application shall be signed by such head and shall show in detail why the inspection is desired, the name and address of the taxpayer who made the return, and the name and official designation of the person it is desired shall inspect the return*” [Part III, art. 3.]

“458.34 *Inspection by Government attorneys.* Any return shall be *open to inspection* by a United States attorney or by an attorney of the Department of Justice where necessary in the performance of his official duties. The request for inspection shall be in writing and, except as provided in sec. 458.37, shall be addressed to the Commissioner, and shall state the purpose for which inspection is desired. It may be signed by the Attorney General, the Assistant to the Attorney General, an Assistant Attorney General, or a United States attorney.*” [Part III, art. 4.]

“458.35 *Information returns.* Information returns, schedules, lists, and other statements designed to be supplemental to, or to become a part of, the returns shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by the regulations in this subpart the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return.*” [Part III, art. 5.]

“458.36 *Place of inspection.* Generally, returns may be inspected only in the Bureau of Internal Revenue, Washington, D. C., unless such returns are in the custody of a collector of internal revenue or internal revenue agent in charge, in which event the returns may be inspected in the office of such collector or agent in charge, but only in the presence of an internal revenue officer, designated by the collector or agent for that purpose.*” [Part III, art. 6.]

“458.37 *Applications for inspection.* Except as provided in sec. 458.33, and as hereinafter provided, all applications for permission to inspect returns must be made in writing to the Commissioner of Internal Revenue. When a return is in the custody of a collector of internal revenue or internal revenue agent in charge, such collector or revenue agent in charge, upon written application to him, is authorized to permit the inspection of such return by a United States attorney, or an attorney in the Department of Justice, or by the taxpayer or his duly authorized attorney in fact, in accordance with the regulations in this subpart.*” [Part III, art. 7.]

“458.38 *Penalties.* Section 3167, Revised Statutes, as amended by the Revenue Act of 1918, and reenacted without change by section 1115 of the Revenue Act of 1926 (44 Stat. 117; 26 U. S. C. 1828), makes it a misdemeanor, punishable by fine not exceeding \$1,000, or by imprisonment not exceeding one year, or both, at the discretion of the court, for any person to print or publish in any manner whatever not provided by law information contained in any income return, and further provides that if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment. The penalties provided in sec-

tion 3167, Revised Statutes, are applicable also to disclosure of information contained in excess-profits and capital stock tax returns and returns made under title IX of the Social Security Act.*” [Part III, art. 8.]

“458.39 *Former regulations revoked.* Former regulations issued with the approval of the President in respect of inspection of returns, except regulations relating to the inspection of returns by committees of Congress, regulations relating to overassessments contained in Treasury Decision 4583 [C. B. XIV-2, 318 (1935)], and regulations governing the inspection of income tax returns, Form 1042B, by the Department of National Revenue, Ottawa, Canada, are hereby revoked to the extent that they are inconsistent with secs. 458.0-458.39.*” [Part III, art. 9.]

“458.64. *Penalties for disclosure of returns.* Section 3167, Revised Statutes, as amended by the Revenue Act of 1918 and reenacted without change by section 1115 of the Revenue Act of 1926, makes it a misdemeanor punishable by a fine not exceeding \$1,000 or by imprisonment not exceeding 1 year, or both, at the discretion of the court, for any person to print or publish in any manner whatever not provided by law information contained in any income return, and further provides that if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment. The penalties provided in section 3167, Revised Statutes, are applicable also to disclosure of information contained in excess-profits and capital

*For statutory and source citations, see note to sec. 458.0.

stock tax returns and returns made under title IX of the Social Security Act.”* [Part I, art. 4.]

“458.90. *Use of returns in litigation.* The return of an individual, partnership, corporation, or fiduciary, or a copy thereof, may be furnished to a United States attorney for official use in proceedings before a United States grand jury or in litigation in any court, where the United States is interested in the results, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney General, the Assistant to the Attorney General, or an Assistant Attorney General. When a return or copy is thus furnished, it must be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use. The original return will be furnished only in exceptional cases, and then only when it is made to appear that the ends of justice may otherwise be defeated. Neither the original nor a copy of a return desired for use in litigation in court will be furnished where the United States Government is not interested in the result, but this provision is not a limitation on the use of copies of returns by the persons entitled thereto.”* [Part IV, art. 1.]

Each of the above statutes and regulations are challenged inherently and as construed and applied in this case.

*For statutory and source citations, see note to sec. 458.60.

Title 26, Section 55, U. S. Codes, Inherently and as Construed and Applied in This Case and the Regulations Issued Pursuant Thereto Are Unconstitutional in That They Violate the Defendants' Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

(a) Members of the Bureau of Internal Revenue were not authorized to disclose the information which they had obtained in the course of their official duties, which under the statute was unconstitutional.

(b) Statements taken by members of the Bureau of Internal Revenue pursuant to the authority vested in them by statute to compel such statements must either be limited to the use for which they are given or their compulsion violates the Fifth Amendment to the Constitution of the United States.

During the course of the trial, the court called Donald Oliver Bircher, a special agent of the Bureau of Internal Revenue, to testify not only regarding income tax statements taken from the defendants but a statement taken from Lou Segal.

The following challenge was made at the time:

"Mr. Lavine: I want to make an objection and I think I can make it more specifically if I have that statute before me. [204]

The Court: You might state what your objection is in the meantime and, if you wish to amplify it later, you may do so.

Mr. Lavine: I have the objection in mind but I could make it more specifically if I had the book before me.

The Court: Make it and then you may amplify it later.

Mr. Lavine: Very well. We object at this time on the ground that the document which counsel has not exhibited does not contain specific authority, first of all, for counsel to secure from this witness matters that have occurred in connection with the Bureau of Internal Revenue's investigation, and that there is no specific authority to use that information in this specific trial. That is the first objection. The second objection which I wish to present to your Honor is that Title 26, Section 55, which provides that the records of the Bureau of Internal Revenue are public records but with certain limitations therein specified, as attempted now to be construed and applied in this case by the government, is unconstitutional and is in violation of the defendant's rights under the fourth and fifth Amendments to the Constitution of the United States, in this respect. Your Honor will bear in mind that in connection with the duties of a citizen and taxpayer he has the duty to present to the Bureau of Internal Revenue all facts relating to his tax situation and those duties are mandatory. They are compelled by statute. [205] They being compelled by statute to be performed and the defendant having performed them in respect to these matters, or the accused having performed them in respect to these matters, his testimony before the Internal Revenue Department or his statements before that bureau would then and thereafter be compelled testimony within the meaning of the language of *Feldman v. The United States*. Your Honor probably recalls the *Feldman* case, in which case there was compelled testimony. That is contained in 322 U. S. at page 487. That was a case where testimony was compelled before a State agency, it was admissible in the Federal Court but the language is implicit in that case that, if it had been before a federal agency, that testi-

mony would then be inadmissible in any federal court. And, so far, then, as the government now seeks to have this statute construed to permit the use in evidence in a criminal trial of matters that are compelled by statute to be performed in connection with the Bureau of Internal Revenue, that statute is challenged inherently and as construed and applied in this case as violative of the fifth amendment to the Constitution of the United States.

In respect to my argument, your Honor, the court in the Feldman case points out that the Constitution prohibits an invasion of privacy in proceedings over which the government [206] has control and it would be implicit in the decision in that case that, had the testimony there been compelled in a federal proceeding, it would have been inadmissible and would have violated both the fourth and fifth Amendments to the Constitution of the United States. And for those reasons I now challenge the proceedings about to be had by the government, on those grounds.

The Court: There are some exceptions, are there not, Mr. Lavine, in the statute?

Mr. Lavine: Yes; there are exceptions contained in the statute and the statute contains permission for the Collector of Internal Revenue to grant permission to the government, but it would seem, as I read that statute, that that permission must be construed in the light of all of its associated paragraphs and chapters and that, construed in that light, it would give that permission in the case of an investigation of an Internal Revenue violation. I do not think that Congress ever intended to extend the scope of that statute to permit the use of information secured by the Bureau of Internal Revenue, presumably confidential in its nature and for the purpose of having the tax-

payer give to the government all that is due to the government, in some other proceeding which is not related to tax matters. Your Honor could very well see that such a construction would probably defeat the very purpose which the broad scope of the Internal Revenue statute [207] has of encouraging in every respect the fullest payment of all taxes due, in every respect, to the government. And for that reason, as the statute is now attempted to be construed and applied in broadening its scope or sphere of application, it is challenged as violative of the fourth and fifth Amendments of the Constitution. Of course, if your Honor holds with me that the statute doesn't have the scope which the government seeks to have placed upon it by the evidence which they are now about to offer, then it gives a constitutional construction to the statute and gives one which I think is within the clear intent of Congress."

An examination of Section 55, Title 26, provides that returns shall constitute public records but "except as hereinafter provided in this section," they shall be open to inspection only upon order of the president and under rules and regulations prescribed by the secretary and approved by the president.

Hence, two things are necessary before the returns can be made public: (1) There must be an order of the president, and (2) they must comply with rules and regulations prescribed by the secretary and approved by the president.

It is not sufficient, merely to have an order of the Commissioner of Internal Revenue. The government in this case has read statutes to provide in the alternative: (1) Letter of the president "or" (2) rules and regulations

prescribed by the secretary and approved by the president. The statute does not so state. It says "and" instead of "or" and therefore requires both before any record can be used.

There was a demonstration of this during a recent congressional investigation of former Congressman May wherein a specific request of the president was sought. If only a secretary's authority was needed, no request would have been made of the president in this case.

Furthermore, inspection by committees of Congress may not be furnished the information "sitting in executive session." In other words, not even Congress can make it public at a public hearing. Therefore, certainly there was no intent on the part of Congress to make a taxpayer's return or any statement he made to the Internal Revenue Department public in court, if not even Congress can use it in any other manner than in an executive session.

(c) Since under Section 54, Title 26, the taxpayer is compelled by statute to make such return and statements, the statement has the effect of being compulsory and therefore cannot be used against an accused in any criminal trial, unless the statute of compulsion which it requires. Any other provision or construction would be in violation of the Fifth Amendment to the Constitution of the United States.

See

Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110;

Brozen v. Walker, 161 U. S. 591, 40 L. Ed. 819;

Monia v. U. S., 317 U. S. 424.

The regulations provide that the United States Attorney is limited to the use in any event for which the inspection was permitted: "When a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished."

This means that the request must be specific and must specifically designate what use is to be made of it and not permit it to be an omnibus catch-all general use.

There was a failure to comply with such specific requirements, even if the sections and regulations be construed as constitutional.

Title 26, Section 55, U. S. Codes and Treasury Regulations TD 4945, §463D4, §463D5; TD 4929, §463C34, 463C36, 463C37, 463C35, §45831, 45833, 45834, 45838, 45839, 45890 and 458.64, inherently and as construed and applied in this case are unconstitutional and in violation of the Fifth Amendment to the Constitution of the United States, in that although the statements are compelled through the authority of law the statute does not grant immunity for use of these compelled statements as broad as the provisions of the Fifth Amendment to the Constitution of the United States.

Title 26, Section 54, U. S. Codes, provides as follows:

“§54. Records and special returns—(a) By taxpayer.

Every person liable to any tax imposed by this chapter or for the collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Commissioner, with the approval of the Secretary, may from time to time prescribe.

(b) To determine liability to tax.

Whenever in the judgment of the Commissioner necessary he may require any person, by notice served upon him, to make a return, render under oath such statements, or keep such records, as the Commissioner deems sufficient to show whether or not such person is liable to tax under this chapter.

(c) Information at the source.

For requirement of statements and returns by one person to assist in determining the tax liability of another person, see sections 147 to 150.

(d) Copies of returns.

If any person, required by law or regulations made pursuant to law to file a copy of any income return for any taxable year, fails to file such copy at the time required, there shall be due and assessed against such person \$5 in the case of an individual return or \$10 in the case of a fiduciary, partnership, or corporation return, and the collector with whom the return is filed shall prepare such copy. Such amount shall be collected and paid, without interest, in the same manner as the amount of tax due in excess of that shown by the taxpayer upon a return in the case of a mathematical error appearing on the face of the return. Copies of returns filed or prepared pursuant to this subsection shall remain on file for a period of not less than two years from the date they are required to be filed, and may be destroyed at any time thereafter under the direction of the Commissioner.

(e) Foreign personal holding companies.

For information returns by officers, directors, and large shareholders, with respect to foreign personal holding companies, see sections 338, 339 and 340.

For information returns by attorneys, accountants, and so forth, as to formation, and so forth, of foreign corporations, see section 3604.”

In *Counselman v. Hitchcock*, 142 U. S. 547-586, 35 L. Ed. 1114, the court said:

“It is an ancient principle of the law of evidence, that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures. *Rex v. Slaney*, 5 Car. & P. 213; *Cates v. Hardacre*, 3 Taut. 424; *Maloney v. Bartley*, 3 Campb. 210; 1 Stark Ev. 71, 191; *Sir John Friend’s Case*, 13 How. St. Tr. 16; *Earl of Macclesfield’s Case*, 16 How. St. Tr. 767; 1 Greenl. Ev. §451; 1 Burr’s Trial, 244; Whart. Crim. Ev. (9th ed.) §463; *Southard v. Rexford*, 6 Cow. 255; *People v. Mather*, 4 Wend. 229; *Lister v. Boker*, 6 Blackf. 439.”

And it is further said:

“It is quite clear that legislation cannot abridge a constitutional privilege, and that it cannot replace or supply one, at least unless it is so broad as to have the same extent in scope and effect. It is to be noted of §860 of the Revised Statutes that it does not undertake to compel self-criminating evidence from a party or a witness. In several of the state statutes above referred to, the testimony of the party or witness is made compulsory, and in some either all possibility of a future prosecution of the party or witness is distinctly taken away, or he can plead in bar or abatement the fact that he was compelled to testify.

We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitution prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.”

There is no doubt the statute compels disclosure. It does not grant immunity as broad as the disclosure which is compelled.

Counselman v. Hitchcock, 142 U. S. 547-586;

Monia v. U. S., 317 U. S. 424.

As construed and applied in this case, also, the Statute and applicable sections offend the Fifth Amendment. There is, of course, no difference between a regulation issued pursuant to purported statutory authority and what it does than there is to the statute. The executive does not have as great a power as Congress. The only power he has is such as Congress gives him. Therefore, if the original source failed to comply with constitutional mandate, everything that follows it must necessarily be unconstitutional.

The statute regarding inspections, furthermore, does not authorize use in litigation. It is only a regulation presumed to have been issued pursuant to congressional

authority that attempts to give such additional rights or benefits to the United States of America. Such authority is not warranted by an examination of the statutes, its purposes or its history.

The court therefore erred in admitting the returns of the taxpayers to which they objected and the use of such compelled information violated the defendants' rights under the Fifth Amendment to the Constitution of the United States.

The court erred in refusing defendants' instructions on the free and voluntary character of the statements.

The defendants objected to the statements as not being free and voluntary and as a violation of their Constitutional Rights under the Fifth Amendment to the Constitution of the United States.

These proposed instructions were submitted to the court as a request to charge the jury to determine whether the statements were free and voluntary:

“Defendants’ Proposed Instruction No. 26

“You are instructed that if you find that any statements which any of the agents of the Internal Revenue Department testified defendants made were made or given by such defendant under compulsion or fear of prosecution, then you must disregard such statements in determining the innocence or guilt of such defendant or defendants.

Defendants’ Proposed Instruction No. 28

You are instructed that the Government in this case has produced the testimony of agents of the Internal Revenue Department to testify against the accused. Before this testimony can be received in

evidence, it must be shown that the statements made were made freely and voluntarily and without the slightest pressure of fear or hope of immunity or reward of any kind or character, or of any benefits to be gained by making the statement.

The mere fact that the statement as made is labeled voluntary does not make it so. You must consider the exact situation in which the accused found himself at the time of making the statement and determine from all of the facts and circumstances as they appear to you, under these instructions, whether the statements as made were freely and voluntarily made.

An accused may be under the greatest of fear or have the highest hopes of reward, and yet say that he is making his statement voluntarily, when in truth and in fact, the statement was not so made in the eyes of the law. If, from the evidence in this case, you determine that any statement made by any accused to the agents of the Internal Revenue Department were not made freely and voluntarily, but were made with a hope of reward or promise of immunity, or to benefit the accused by making the statement, such pressure will require you to disregard the statement so made, as though it had never been made.

Lisenba v. California, 315 U. S. 826, 86 L. Ed. 1222;

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716;

People v. Dye, 119 Cal. App. 262." [R. 67-88.]

The instructions were refused.

Where there is an issue as to whether a statement which is given is free and voluntary, the mere fact that it is

labelled free and voluntary does not make it so, and an accused is entitled to have the issue submitted to the jury.

Lisenba v. California, 314 U. S. 219, 86 L. Ed. 166;

Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716;

People v. Dye, 119 Cal. App. 262;

Bram v. United States, 168 U. S. 532, 42 L. Ed. 568;

Gros v. United States, 136 F. (2d) 878.

The court therefore erred in admitting the income tax statements of the defendant and also the statement of Lou Segal taken from Donald Oliver Bircher.

The Evidence Was Insufficient to Justify the Verdict as to Each Count. The Following Argument Proceeds Without Using Our Contention That the Indictment Fails to State an Offense.

Count I of the indictment charges the defendants with felony conspiracy. It is alleged that the Southern California Meat Company, Charles M. King, Hyman Stillman and Lou Segal conspired, etc. [R. 3], to violate the "Emergency Price Control Act" (not as amended). The gist of the offense of conspiracy is the unlawful agreement and an overt act in furtherance of it.

Pettibone v. U. S., 148 U. S. 197, 37 L. Ed. 419;

Weniger v. U. S., C. C. A. 9, 47 F. (2d) 692.

Proof of unlawful agreement is necessary.

Linde v. U. S., 13 F. (2d) 59;

Marcante v. U. S., 49 F. (2d) 156;

Dahly v. U. S., 50 F. (2d) 37;

Pelz v. U. S., 54 F. (2d) 1001;

Asgill v. U. S., 60 F. (2d) 780.

No unlawful agreement is shown anywhere in the evidence between these defendants, and the date of the alleged unlawful agreement, as set out in the indictment, was on or about July 1, 1943. [R. 3.] Nowhere is such agreement shown to have been formed on or about that date, or at any time. For that reason Count I of the indictment was not established by any legal or competent evidence.

Counts II and III allege a transaction between the defendants and William Meuhlberger. Counts II and III specify general terms of the sale of beef and veal in excess of the Maximum Price. Meuhlberger testified that he purchased the meat from Southern California Meat Company No. 2. [R. 88-89.] He said he talked to Mr. Stillman [R. 90] and that he asked Mr. Stillman if he could get some meat, and all that he can recall is that Mr. Stillman said, "It will be five cents, over." [R. 93.] He has no knowledge of how much meat was delivered to him. [R. 101.] He subsequently got into an argument with Mr. Stillman. [R. 102-103.]

Viewing the nature of the transaction and the fact that he was the only witness, the evidence alone was certainly insufficient to establish violation of the statute.

See

Dahley v. U. S., 50 F. (2d) 37.

The court, prosecutor and jury apparently treated the transaction as one that would also bind Mr. Segal, although there is not one iota of testimony as to Mr. Segal. Mr. Segal was not present and it was not shown that he did in any way engage in the transaction.

A partner is not charged with the criminal acts of his co-partners or others acting in behalf of a firm unless he has knowledge thereof. Therefore, the mere fact that a partnership is business cannot be the basis of conviction even for conspiracy, let alone the substantive of offense.

U. S. v. Cohen, 128 Fed. 615, affirmed 145 Fed. 1, certiorari denied 200 U. S. 618, 50 L. Ed. 623.

What we have said here relates to most all of the transactions. Count Four relates to a transaction with the Clover Meat Company, and the witness Horace Greeley Weaver could not identify how much he paid for any particular meat at any time, nor how much he paid "over" the amount, in this transaction. Some transactions related only to Stillman, others to Segal only. The evidence as to each was indefinite and uncertain and therefore supported none of the counts.

Counts Four, Five and Six relate to an alleged transaction with the Clover Meat Company.

He said he paid for meat and gave him some additional cash. He did not know what amount. [R. 113.] He did not remember the price or from one purchase to another. [R. 114.] He did not remember on any invoice what he paid. [R. 116.]

This evidence is entirely insufficient to establish the charges herein. It only relates, furthermore, to his dealings with Lou Segal and nothing whatever was said regarding Hyman Stillman.

Counts Twelve, Thirteen, Thirty-two, Thirty-seven, Thirty-eight, Thirty-nine, Forty, Forty-one, Forty-two, Forty-three, Forty-four and Forty-five are "false entry" counts.

There is no evidence in the record that these defendants made these invoices or caused them to be made falsely, at the time of their making.

There is no proof of guilty knowledge.

The invoice was something that was given, apparently, to the customer as a bill. It is not shown, and there is nowhere in the evidence that it was shown, to be a document to be required to be kept under the provisions of the Emergency Price Control Act of 1942, or any regulation thereunder. This was assumed but not proved.

The other counts relate to sales to Dana and Roberts. These transactions also only were with Lou Segal and not with Hyman Stillman.

Leo Blank testified he did not know the amount he paid, but to his recollection it would be a penny a pound. He did not state how much he paid. [R. 183.]

Throughout the court's instructions the court gave instructions on the Emergency Price Control Act of 1942, as amended. This was error since the indictment did not charge a violation of the Emergency Price Control Act, as amended. [R. 327, 329.]

The defendants moved the court to direct the jury to enter judgments of acquittal because of the termination of the statute. The motion was denied. [R. 367 *et seq.*]

The statement of the court that the prices to which he referred were "fixed in accordance with the Emergency Price Control Act of 1942" is incorrect since no Price Regulation is here involved in this case or issued under the Emergency Price Control of 1942. It is only by reason of later amendments and regulations issued pursuant to those amendments.

The Court Erred in Connection With Instructions Given.

The court committed the following errors in the given instructions:

“I now instruct you that under the Emergency Price Control Act of 1942, *as amended*, and the Maximum Price Regulations, Nos. 169, 148 and 239, the highest prices which could be charged for the various meat items involved in this case are, as to each count of the indictment concerned with a sale of meat, as I shall now read to you.

Count 2: Grade A beef 21 cents a pound; Grade A veal $21\frac{3}{4}$ cents a pound;

Count 3: Grade a beef 21 cents a pound;

Count 4: Grade A beef $20\frac{3}{4}$ cents a pound;

Count 5: Grade A beef $20\frac{3}{4}$ cents a pound;

Count 6: Grade A beef $20\frac{3}{4}$ cents a pound;

Count 12: Grade B beef $18\frac{3}{4}$ cents a pound;

Count 13: Grade A beef $20\frac{3}{4}$ cents a pound;

Count 45: Grade A beef \$20.75 per hundred pounds or $20\frac{3}{4}$ cents a pound;

Count 46: Grade A beef \$20.75 per hundred pounds or $20\frac{3}{4}$ cents a pound;

Count 47: Grade A veal \$21.50 per hundred pounds or $21\frac{1}{2}$ cents per pound; Grade B veal \$19.50 per hundred pounds or $19\frac{1}{2}$ cents per pound;

Count 48: Grade A veal \$21.50 per hundred pounds or $21\frac{1}{2}$ cents a pound;

Count 49: Grade A veal \$21.50 per hundred pounds or $21\frac{1}{2}$ cents a pound;

Count 50: Grade B veal \$19.50 per hundred pounds or $19\frac{1}{2}$ cents a pound.” [R. 362.]

It will be noted that the instruction relates to the Emergency Price Control Act of 1942, *as amended*, and the Maximum Price Regulations under such amended act. However, the indictment does not charge the Emergency Price Control Act of 1942 “as amended” and it would not be possible for the court to so instruct the jury as it was not within the terms of the indictment. If it were so possible, it would constitute in effect an amendment or change of the indictment itself, which this court has held could not be done.

Carney v. U. S., No. 11001, Ninth Circuit Court of Appeals;

Ex parte Bain, 121 U. S. 1;

Edgerton v. U. S., 143 F. (2d) 697.

The instruction also invaded the province of the jury as to the price for the type and kind of meat allegedly bought and sold.

The Court Erred in the Admission and Exclusion of Evidence.

The court erred in failing to strike the evidence of the invoices on the grounds that no proper foundation had been laid, to-wit: Title 28, Section 695, U. S. Codes; Title 28, Section 656. [R. 321, also R. 304, 305.]

At no time were the invoices which were offered shown to have been made in the regular course of any business or that it was the regular course of such business to make such memorandum or record at the time of such transaction, occurrence, or event, or within a reasonable time thereafter.

The possession of such invoice did not prove the transaction involved. None of the witnesses in question were able to testify to any of the transactions except from the purported invoices, for which no proper foundation was laid and the motion to strike should have been granted.

The court also erred in the admission and exclusion of the following other evidence in the case:

The court erred in the receipts of testimony of Samuel J. Phoebus, special agent of the Bureau of Internal Revenue [R. 292], and Government's Exhibit 38.

This was objected on the grounds that it violated the defendants' rights under the fourth and fifth amendments to the Constitution of the United States and on other grounds. [R. 293.]

The same objections were made to Government's Exhibit 39, consisting of the books and records of the Southern California Meat Company No. 2 [R. 297 to 299; 304, 305.]

The court erred in the admission of the testimony of Samuel J. Namson and admitting accounts of records which this accountant completely examined but did not audit. [R. 148, 139.]

The income tax return that Mr. Namson prepared was for Mr. Rosensweig, not for the defendant. [R. 152.]

The court erred in the admission of hearsay testimony of Mr. Weaver. [R. 131.]

As to the false entry count, there is no evidence that the defendants wilfully made any entries in their accounts or wilfully omitted any entries in their accounts.

Two instructions were offered along this line to the jury and both were refused: The defendants' proposed instruction No. 45, page 71 as follows:

"You are instructed that certain courts charged the making or keeping of a false record.

If you find from the evidence that the record honestly reflected what the defendant honestly believed to be correct, then you must acquit him of such counts."

And defendants' proposed instruction No. 47, page 72, as follows:

"You are instructed that the faith of the defendants in their transactions is always a matter to be considered by the jury, and if the jury finds that the accused acted in good faith, even though mistaken, then you must acquit the accused."

Also, defendants' instruction No. 13, page 61, as follows:

"You are instructed that a contrivance or device to evade provisions of an Office of Price Administration regulation may be unlawful; yet, if the defendant in good faith conscientiously believes that he was not violating the law in anything that he did or failed to do, as shown by the evidence, then he is not guilty of wilfully violating such regulation. This is true, notwithstanding that his act or omission may as a matter of law constitute an evasion of the provisions of a regulation."

The Court Erred in Refusing the Defendants a Bill of Particulars, as Demanded. [R. 28.]

This demand was in addition to the Motion to Dismiss for want of uncertainty. The indictment itself was in the language of conclusions of the pleader. It merely alleged prices in excess of the Maximum Price. It failed to set out the particulars.

The Motion to Dismiss should have been granted, but in the absence of granting that Motion the Motion to grant a Bill of Particulars should then have been granted.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516;

Foster v. U. S., 253 Fed. 481;

Miller v. U. S., 288 Fed. 817;

Sixth Amendment, Constitution of the United States.

A defendant is entitled to particulars as to times, places, persons present and other data necessary to make his defense.

New Rules of Criminal Procedure, Rule 7, subdivision (f);

Glasser v. U. S., 315 U. S. 60, 86 L. Ed. 680.

The court erred in formula instructions as to prices. [R. 362.] These prices were a question of fact, based upon evidence. The government had put on an expert witness to determine these prices. It was not for the court to give these prices, such an instruction invaded the province of the jury.

The court erred in refusing defendants' proffered instruction on good faith.

The Emergency Price Control Act of 1942 makes good faith a defense.

The Government failed to prove that defendants acted with guilty knowledge or that they believed they were doing anything more than taking gifts or commercial bribes for preferences, and not any overceiling prices.

There was no evidence before the jury of any regulation which precluded the taking of a gratuity or in fact the terms of any regulation.

There was no evidence of the promulgation or publication in the Federal Register of any Regulation. Hence, the defendants were entitled to have the question of their good faith submitted to the jury from a requested instruction.

Motions for Judgment of Acquittal Should Have Been Granted.

Motions for judgment of acquittal at the close of the case should also have been granted on each of the grounds specified: Insufficiency of the evidence; the lack of authority in the Statute, and the invasion of the Constitutional rights of the defendants.

U. S. v. Hark, 320 U. S. 320, U. S. 531, 88 L. Ed. 290;

U. S. v. Chambers, 291 U. S. 217, 78 L. Ed. 736;
Sixth Amendment, Constitution of the United States;

Fifth Amendment, Constitution of the United States;

U. S. v. Cruickshank, 92 U. S. 542, 23 L. Ed. 588;
Counselman v. Hitchcock, 142 U. S. 547-586.

Motion in Arrest of Judgment Should Have Been Granted.

The defendants moved in arrest of judgment on each of the grounds set out hereinabove [R. 49-50], as follows:

“MOTION IN ARREST OF JUDGMENT

Come now the defendants Hyman Stillman and Lou Segal in the above-entitled case and move in arrest of judgment as follows:

I.

The indictment and each count thereof fails to state an offense against the laws of the United States.

II.

The indictment and each count thereof is vague, indefinite and uncertain, and violates the Sixth Amendment of the Constitution of the United States in that it fails to set forth facts which apprise the accused of the nature and cause of the offenses.

III.

The trial court erred in admitting into evidence income tax statements which were made by defendants under the compulsion of the law, and which were used against the defendants in violation of their Constitutional rights under the Fourth and Fifth Amendments of the Constitution of the United States.

IV.

The court erred in the admission of statements made by the defendants which were not freely and voluntarily made, but were made under the compulsion of the law to members of the Bureau of Internal Revenue, and the judgment based upon such statements was, therefore, based upon evidence ille-

gally secured, in violation of the defendants' rights under the Fifth Amendment to the Constitution of the United States, and particularly under its privileges and immunities and due process clauses.

V.

The court was and is without jurisdiction to pronounce judgment for the reason that the statute giving jurisdiction to the court to try defendants has expired.

VI.

The court is without jurisdiction to act in any O.P.A. matter because not only has the jurisdiction of the court ended with the termination of the Office of Price Administration statute, but all regulations thereunder have also ended and the particular provisions of the statute providing for jurisdiction of the District Courts of the United States have ended.

MORRIS LAVINE."

On the basis of the arguments heretofore presented and the cases heretofore cited, the motion in arrest of Judgment should have been granted.

Conclusion.

For each and all of these errors, appellants pray for a reversal of the Judgment with directions to dismiss the indictment.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellants.

No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S REPLY BRIEF.

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No. 11381

IN THE

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vs.

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Appellee.

APPELLEE'S REPLY BRIEF.

Statutes and Regulations Involved.

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

“If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.”

Section 4 of the Emergency Price Control Act of 1942 (50 U. S. C. App. 904) provides in part as follows:

“It shall be unlawful, regardless of any contract, agreement * * * or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise do or

omit to do any act, in violation of any regulation or order * * * of any price schedule effective in accordance with the provisions of this Act.”

Section 202(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 922(b)) provides as follows:

“The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, * * * to furnish any such information under oath or affirmation or otherwise, to make and keep records and other documents, * * *.”

Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925) provides in part as follows:

“Enforcement.

* * * * *

“(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than * * * one year * * * or to both such fine and imprisonment * * *.”

Maximum Price Regulations 148, 169 and 239 are the Regulations of the Office of Price Administration making detailed provisions with reference to specific products of the type involved in this case. These Regulations, in so far as they apply to this case, are set forth in the Appendix to this brief.

Statement of Facts.

The indictment in this case consisted of fifty counts. The appellants, Stillman and Segal, were both found guilty of the same counts, namely, twenty-three in number. For reasons unimportant to this appeal the other counts were dismissed; excepting as to Count 26, they were dismissed after the Government had abandoned the same by not offering any evidence concerning such counts.

The first count charged a conspiracy to violate the Emergency Price Control Act of 1942, 50 U. S. C. App., Sec. 901 *et seq.* The conspiracy count referred to certain Revised Maximum Price Regulations pertaining to the sale of meat, the most important of which is Regulation 169, pertaining to beef and veal. The remaining counts of the indictment charge substantive offenses of two types, *i. e.*, in excess of the legal maximum price allowed and falsification of entries and documents required to be kept under the provisions of the Emergency Price Control Act and Regulations. The substantive counts were likewise predicated upon 50 U. S. C. App., Sec. 901 *et seq.*

The counts on which both appellants were found guilty are identified as follows:

Count 1—conspiracy count (from July 1, 1943, to March 11, 1946).

The counts charging over-ceiling sales are the following:

Counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50. (These offenses are charged to have occurred at specific dates from about August, 1944, through March, 1945.)

The counts charging false entries or falsification of records, of which appellants were found guilty, are Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43 and 44. (These

offenses likewise are charged to have occurred from about September, 1944, through March, 1945.)

The evidence indicated that the appellants and others had sold wholesale cuts of meat to various retail butchers at prices in excess of the invoice reflected price. Invoices issued for each sale of meat carried the maximum ceiling price as of the date of such sales; in addition, appellants caused an over-ceiling price to be obtained in cash. The evidence indicated that the price per pound obtained in excess of the invoiced price per pound, or ceiling price, varied from one to eight cents per pound, in most instances being from four to five cents per pound in excess thereof.

Government's witness Edward F. Cunningham [R. 288 to 291] was a Price Specialist of the Office of Price Administrator during the pertinent periods. Witness Cunningham was shown the various invoices or exhibits having been received into evidence and was prepared to testify concerning the maximum price as the same applied to each meat item as of the dates of the specific sales, whereupon counsel for the appellants stipulated with counsel for the Government that the prices shown for the meat items, beef, veal, pork products, etc., on the invoices were the maximum ceiling prices for those items on the dates of sales [R. 290]. The case was submitted to the jury under this theory, as is reflected in one of the court's instructions [R. 362]. No objection was made by counsel for appellants to such instruction.

For the purpose of convenience we have attached to the close of this subheading a chart of the various Government's exhibits, together with the specific counts that such exhibits were offered in support of. This index of exhibits may be helpful. It should, however, not be construed as an admission that the other exhibits, to which no

particular count is referred, were not also offered in support of the entire case.

Appellants, Stillman and Segal, were first engaged in the wholesale meat business, as partners, from about August, 1944, to January, 1945, under the name of Southern California Meat Company No. 2.

Later, the appellants entered into a partnership with another person not on trial, namely, Aaron Rosensweig [R. 154], for the purpose of conducting a meat business known as the "Central Packing Company." This later partnership started about January 1, 1945, for the purpose of buying, slaughtering cattle, and disposing of and selling the meat [R. 156].

The understanding was that appellant Stillman was the "head man at the office" and operated the office [R. 157]. Rosensweig's obligation was to buy and provide cattle for the business. Appellant Segal was to take care of the plant operations, cooler, salesmen, etc. [R. 156]. This business operated for a brief period of about three months [R. 158], following which the books of the Central Packing Company (the copartnership) was taken by Mr. Rosensweig to a Mr. Namson, also a witness, for the purpose of having income tax returns prepared. Shortly after this partnership had been terminated the assets were divided between the three partners, as is reflected by the checks [Government's Exhibits 12, 13 and 14].

Witness Samuel Namson [R. 139] testified as to certain statements made in his office during either the month of March or April, 1945, by the appellants Stillman and Segal. These statements or admissions were made with respect to Government's Exhibits Nos. 10 and 11, being certain pages from the books of the Central Packing Company.

Witness Namson stated that he, as an accountant, in his desire to prepare the income tax returns for a former partner, Mr. Rosensweig, had had conversations with both Stillman and Segal [R. 142], and had discussed with them entries in the books of their partnership [Exhibits 10 and 11], and particularly he discussed with reference to an entry in the journal of \$30,100 [R. 142-143]. During this conversation witness Namson stated that Stillman told him, Namson, that this money reflected a credit entry from the sale of meat to different customers, and that appellant Stillman stated, "that this is money which has been accumulated from sale of meat to different customers and he called his bonuses over and above the ceiling prices that they paid" [R. 143]. Witness Namson further inquired of both Stillman and Segal why this \$30,100 was not entered to "sales" instead of crediting it to different partners, and then stated that Stillman said they were bonuses and didn't consider them as sales [R. 143-144].

Witness Namson continued, and stated that he called attention to Stillman and Segal that by a correct entry, namely, after the entry crediting the sales with \$30,100, that that naturally increased the sales from \$1,236,000.00 to \$1,266,000.00. This testimony pertained to Government's Exhibit 10 [R. 144-145]. Witness Namson stated that he corrected the trial balance accordingly, thereby increasing the sales, and that Mr. Stillman put the item on the document in his presence on that day.

Namson further testified that Stillman stated: "We are in a partnership or joint venture. Three of us invested an equal amount of money" [R. 147]. Upon cross-examination the witness Namson again stated that Stillman, in the presence of Segal, had admitted the receipt of a sizeable sum of money from the operation of the business, namely,

as bonuses from the sale of meat over and above the ceiling price [R. 149-150].

Various retail meat dealers testified concerning specific purchases they had made, to the effect that they had paid per pound for meat a sum in excess of that reflected by the various invoices introduced into evidence.

Witness William Muehlberger [R. 85] stated that during the fall of 1944 he was acquainted with both Stillman and Segal and that he, witness, conducted a retail market in the vicinity. Witness was shown Exhibit 1, an invoice bearing Serial No. 6034, which pertained to Count 3 [R. 88], and testified that he had bought the merchandise reflected on the invoice and paid for same, and that in addition he had paid a sum over the amount reflected on the invoice, having paid this money to Stillman at the plant known as "Southern California Meat Company," on East Vernon Street [R. 90]. Witness stated that in addition to the check with which he paid for the meat, as per the invoice, he paid an additional sum of money; that he believed it was \$120.00 [R. 92]. That he had had a discussion with Stillman at or about this time, concerning whether he could get some meat, and that Stillman stated, "Yes, it will be five cents over, Bill" [R. 93]. Witness Muehlberger gave like testimony concerning over-payments of approximately five cents per pound with reference to invoice Serial No. 6109, offered in support of Count 2 [Government's Exhibit 2], stating that he paid five cents a pound in addition to the invoice price [R. 95]; that this sum was paid in cash and that he received no receipt for the cash payment [R. 98].

Another retail meat merchant who testified was Horace Greeley Weaver [R. 107]. He was an employee of a concern known as the "Clover Meat Company." He stated

that during 1945, he had a conversation with Segal with regard to purchasing meat for his employer and they held this conversation at the plant on East Vernon Avenue, known as the Southern California Meat Company. Witness stated that in the conversation with Segal he inquired, "How much do you want over for it, Lou?" and that Segal (Lou) stated, "Five cents." I said, "All right, give me some beef" [R. 111].

Witness identified Invoice No. 718, offered in support of Count 13, and stated he procured this meat and paid for it by check in the full amount of the invoice; that he had paid money to Segal in addition to the check for the meat so obtained [R. 113], for which he did not obtain a receipt; that this was a cash payment.

Witness Weaver then referred to Exhibit No. 4, offered in support of Count 5, and stated he had paid for this meat by check [R. 115-116], and that in addition he paid five to eight cents a pound but that he was not sure as to which invoice he paid five cents, or as to which invoice he paid eight cents a pound [R. 116].

Witness Weaver gave similar testimony concerning several other transactions wherein he stated he paid sums of money in cash to Segal for meat obtained over and above the invoiced amount.

Witness Leo Blank, an employee for a meat concern, stated that he knew both Stillman and Segal [R. 180], and that he had paid to Lou Segal, first a penny a pound over the invoiced amount [R. 182]; later, he had paid from one to four cents a pound over the invoiced listing [R. 184-185]. This witness testified similarly to various invoices that were offered in support of various other substantive counts.

Clarence S. Wright [R. 214], engaged in the meat business, gave similar testimony concerning payment of moneys in addition to the amount reflected on the invoice. He, in particular, stated that he made his payments to a person by the name of "Irving," to whom Segal had told him he should make such payments [R. 220]. He stated that he paid two cents per pound for beef over the amount reflected on the invoice [R. 222].

Witness Donald Oliver Bircher [R. 231], Special Agent of the Bureau of Internal Revenue, gave testimony concerning an interview he had requested of appellant Segal, stating that Segal had called at the Government office on June 9, 1945 [R. 245]; that Segal gave a voluntary statement after having been advised of his rights [R. 246], and that he was then inquiring concerning the income tax liability of Segal and that of the partnership known as the Southern California Meat Company No. 2.

Witness stated that the interview had been taken down by a stenographer and that, later, on June 15, 1945, Segal had returned to the office and that the statement theretofore taken had been signed by Segal on June 15, 1945 [R. 251]. This is Government's Exhibit No. 33. Bircher had been subpoenaed by the Government.

In conformity with the requirements as provided by 26 U. S. C., Sec. 55, with regard to the publicity of returns, and likewise with the Treasury decisions providing for their utilization by the Department of Justice, certain correspondence and telegrams were introduced in evidence to justify the Government's position in using such returns, and likewise in obtaining the testimony of the Internal Revenue Agents Bircher and Phoebus, who both gave testimony concerning, first, the interview with Segal and the

taking of his statement [Government's Exhibit 33], and the testimony that Agent Phoebus gave concerning his conversations with the appellants, Stillman and Segal.

Both of these investigations were in the spring and summer of 1945, and pertained to an investigation being conducted by the Internal Revenue, of the income tax liability of Stillman and Segal and their business under the copartnership names.

The documents which were admitted into evidence and which we feel thoroughly comply with the requirements for prior authority and for the utilization of such returns, and the obtaining of the testimony of the Internal Revenue Agents Bircher and Phoebus, are the following:

Government's Exhibit 30, being a letter from the Acting Commissioner of the Bureau of Internal Revenue, granting authority for Agent Bircher to testify and cooperate with the Government in connection with the investigation being conducted in this case.

Government's Exhibit 32, being two letters, one of which was a carbon copy of a letter dated September 27, 1945, from the then United States Attorney to the Attorney General, requesting that authority be obtained from the Commissioner of Internal Revenue, as there indicated, and the original letter of October 5, 1945, being a reply by the Attorney General, to such letter.

Government's Exhibit 34, being a telegram from the Commissioner of Internal Revenue, authorizing the testimony of Agents Bircher and Phoebus, and others, in conjunction with this case and other investigations being conducted.

Government's Exhibit 38, being a letter from the Acting Commissioner of Internal Revenue, granting authority as

outlined in said letter to Agent Phoebus, in connection with this case.

It is thus apparent that compliance was had with the statute and the Treasury decisions with regard to inspection, utilization and the obtaining of testimony relevant to information possessed by said Special Agents in conjunction with their investigation of the income tax matters of both appellants.

Government's Exhibits 35, 36 and 37 are certified copies of returns, all for the calendar year 1944, dealing with either one or the other of the appellants or their co-partnership, the Southern California Meat Company.

Portions of Government's Exhibit 33, a statement that Segal gave, was read into evidence [R. 253]. It should be noted that this testimony was limited to Mr. Segal [R. 302-304].

In this statement Segal stated that in 1944 he and Stillman went into business under the name of Southern California Meat Company No. 2 [R. 255]. Segal stated that while he was engaged in this business, early in 1944, he made collections in the form of "gift money" [R. 257], in addition to the prices received from the sale of meat. Segal conceded that he sold his meat at the regular OPA ceiling price and sometimes received from customers sums of money in addition [R. 257]. Segal stated that most of the customers gave him funds on the side when the meat was sold [R. 258], and that the money was generally paid to him by putting it in his white coat pocket; that no change was ever asked in these donations [R. 260]. Segal stated that early in 1945 he had counted this money and had between \$13,000.00 and \$14,000.00 [R. 261].

Segal stated that he received this side money from August, 1944, until the end of that year; "when I was in the cooler they put some money in my pocket," and that the majority of meat customers made such payments [R. 264]; that they were becoming more generous [R. 265]. That his biggest day had been just before Christmas; this amounted to \$2800.00 [R. 266]. That during the year 1945 the amount received as "contributions," or side money, was approximately \$15,000.00 [R. 268]. (This was but for three months.) That he had considered these payments as "extra profits," or "extra gifts" [R. 276]. That the profit for 1944 from customers was approximately \$25,000.00 from "side money" payments [R. 279].

Special Agent Samuel A. Phoebus, of the Bureau of Internal Revenue, also testified for the Government [R. 292-308]. He, like Agent Bircher, had also been subpoenaed. This witness was in a position to give corroborative testimony concerning the interview had with appellant Segal, as is reflected by the written statement [Government's Exhibit 33], as he was present when it was taken [R. 307]. It was stipulated that his answers would be similar to those of the previous agent, Bircher [R. 308].

Witness Phoebus, as previously indicated, also had authority to testify. Among other things he stated that in April of 1945, he talked with Stillman and was handed a book of the Southern California Meat Company [R. 294]; that this was handed to him in response to his request to look at such books [R. 295]. This book became Government's Exhibit 39. Certain pages of it were broken down into 39-a, 39-b and 39-c. Witness Phoebus stated that he discussed certain entries in the pages of this book [Exhibit 39] with Stillman [R. 298]. Witness further testified that the investigation he was then conducting was

with relation to income tax returns of the Southern California Meat Company No. 2, also Stillman and Segal [R. 299].

Witness Phoebus also testified concerning a conversation he had with appellant Segal [R. 301], and in particular told of a conversation he had had concerning the partnership income tax return [Exhibit 37]. He testified that Segal had told him the item of \$13,828.29, reflected on this return, was "side money," and that Segal had given further explanation as to having received this money from customers during 1944, and after that when he worked in the "cooler" of the Southern California Meat Company No. 2 [R. 306]. Witness further testified that Segal stated this was from meat customers.

As stated, a list of Government exhibits and the counts to which certain exhibits were particularly directed, is the following:

GOVERNMENT'S EXHIBITS WITH REFERENCE TO COUNTS.

(NOTE: In most instances, Government's counsel referred to the count the exhibit had reference to.)

Exhibit

No.	Page
1. Invoice No. 6034, dated Oct. 25, 1944 (For Identification)	85
(In Evidence)	94
Count 3. Reference is invited to the Exhibit itself.	
2. Invoice No. 6109, dated Oct. 25, 1944 (For Identification)	85
(In Evidence)	95
Count 2. Reference is invited to the Exhibit itself.	
3. Invoice No. 718, dated Feb, 26, 1945	(In Evidence) 115
Count 13. Offered in support thereof.	112
4. Invoice No. 607, dated Feb. 21, 1945	(In Evidence) 117
Count 5.	

Exhibit No.		Page
5.	Invoice No. 389, dated Feb. 14, 1945 (In Evidence)	118
	Count 6.	117
6.	Invoice No. 1505, dated March 21, 1945 (In Evidence)	120
	Count 4.	118
7.	Invoice No. 1666, dated Feb. 27, 1945 (In Evidence)	121
	Count 12	120
8.	Invoice No. 165, dated Feb. 7, 1945 (For Identification)	121
	Count 1—Overt act "p."	
9.	Invoice No. 1831, dated March 30, 1945	
	(For Identification)	121
	Count 1—Overt act "r."	
10.	Seven sheets from the books of the (General Ledger)	
	Central Packing Company (For Identification)	140
	(In Evidence)	148
	Count 32, and Count 1—paragraphs "c" and "i."	153
11.	Four sheets from the books of the Central Packing Com-	
	pany (For Identification)	140
	Count 1. (In Evidence)	148
12.	Check for \$24,914.25 to A. Rosenweig (For Identification)	159
	(In Evidence)	160
	Count 1.	
13.	Check for \$25,119.09 to H. Stillman (For Identification)	159
	(In Evidence)	160
	Count 1.	
14.	Check for \$25,119.09 to Lou Segal (For Identification)	159
	(In Evidence)	160
	Count 1.	
15.	Invoices and check, dated Sept. 23, 1944 (In Evidence)	173
	Count 39.	188
16.	Invoice No. 5387, dated Sept. 27, 1944 (In Evidence)	189
	Count 48.	189
17.	Three invoices and check for \$356.60 (In Evidence)	191
	Count 38.	190

Exhibit No.		Page
18.	Invoice No. 6238, dated Oct. 31, 1944 (In Evidence)	192
	Count 49—including Invoices Nos. 6300 and 6221	191
19.	Invoice No. 18263, dated Aug. 31, 1944 (In Evidence)	193
	Count 47.	193
20.	Invoice No. 7073, dated December, 1944 (In Evidence)	173
	Count 50—including Invoice No. 7057	193
21.	Invoice No. 7456, dated Dec. 20, 1944 (In Evidence)	173
	Count 43.	194
22.	Invoice No. 7251, dated Dec. 12, 1944 (In Evidence)	173
	Count 40—including Invoice No. 7267	195
23.	Invoice No. 7579, dated Dec. 28, 1944 (In Evidence)	173
	Count 44—including Invoice No. 7634	196
24.	Several papers including Invoice No. 573, dated Feb. 20, 1945, and Invoice No. 684, dated Feb. 23, 1945	
	(In Evidence)	173
	Count 46.	198
25.	Invoice No. 8135, dated Jan. 17, 1945 (In Evidence)	173
	Count 41.	198
26.	Invoice No. 1201, dated March 13, 1945 (In Evidence)	173
	Count 45.	199
27.	Invoice No. 5110, dated Sept. 12, 1944 (In Evidence)	183
	Count 37.	181
28.	Invoice No. 7413, dated Dec. 18, 1944 (For Identification)	194
	(In Evidence)	217
	Count 42.	200
29.	Group of Invoices (For Identification)	216
	(In Evidence)	226
	Count 1.	217
30.	Letter received Oct. 16, 1945, by Mr. Bircher	
	(For Identification)	234
	(In Evidence)	243
	(From the Acting Commissioner, granting authority for Agent Bircher to testify, etc.)	

Exhibit No.	Page
31. A two-page carbon copy captioned "Income Tax Returns," etc. (For Identification)	241
32. Letter received while Donald Oliver Bircher testified (In Evidence)	244
(i.e., carbon copy of letter dated Sept. 27, 1945, from U. S. Atty., to Atty. Gen., to secure authority from Comm. of Int. Rev., and reply from Atty. Gen., of Oct. 5, 1945.)	
33. Signed statement, dated June 15, 1945, by Mr. Segal (For Identification)	246
(In Evidence)	252
(In Transcript)	253
(Offered and limited as to the appellant Segal only. All Counts [R. 302-304].)	
34. Telegram sent to Mr. Bircher (In Evidence)	286
(From Commissioner of Internal Revenue, authorizing testimony of Agents Bircher and Phoebus.)	
35. Certified copy of income tax returns (In Evidence)	289
(Stillman's return for year 1944, filed March, 1945.)	
36. Certified copy of income tax returns (In Evidence)	289
(Segal's return for 1944, filed March, 1945.)	
37. Certified copy of income tax returns (In Evidence)	289
(Partnership return of Southern California Meat Co., i.e., Stillman and Segal, for 1944, filed January, 1946.)	
38. Letter received by Samuel Phoebus (For Identification)	292
(In Evidence)	293
(From Acting Commissioner of Internal Revenue, granting authority to Agent Phoebus.)	
39. Book of the Southern California Meat Company No. 2 (For Identification)	293
(In Evidence)	299
Count 1.	295
(Broken down into Exhibits 39A, 39B and 39C)	
40. Certified copy of the order for the continuance of the grand jury (In Evidence)	309

I.

Appellants' Contention That the Indictment Is Void Because of the Assertion That the First Count, the Conspiracy Count, Charges a Felony Conspiracy and a Misdemeanor Conspiracy in the Same Indictment, Is Untenable.

The following will be in answer to contentions raised in appellants' brief, commencing on page 5. Previously in this brief we have set forth Section 205b of the Emergency Price Control Act of 1942 (50 U. S. C. A., Sec. 925). This is the penal provision of the Act.

In urging this point appellants stress certain selected language from the case of *Pinkerton v. United States*, 328 U. S. 640. The language quoted in appellants' brief is, of course, the law as applied to the particular situations there discussed by the court, as is noted from page 643 of the opinion. The facts of such referred to cases are readily distinguishable from the instant one and were so distinguished in the *Pinkerton* opinion.

It is the belief of appellee that this case, *i. e.*,

Pinkerton v. United States, 328 U. S. 640,

is definitely adverse to appellants' contention, and we feel the opinion to be so significant that we are setting forth certain matters there decided.

The case involved nine substantive counts and one conspiracy count for violation of Internal Revenue Code. The court pointed out, on page 642, that some of the overt acts in the conspiracy count were the same acts charged in the substantive counts, and that each of the substantive offenses found were committed pursuant to the conspiracy. The appellants in the *Pinkerson* case—also as appellants do

here—contended that the substantive counts became merged in the conspiracy count. In answer to this the court stated, page 643:

“Nor can we accept the proposition that the substantive offenses were merged in the conspiracy.”

The court then refers to certain exceptions, the only language quoted from the opinion by appellants, but further states—

“But these exceptions are of a limited character.”

The court continues and states as follows (pp. 643-644):

“* * * The common law rule that the substantive offense, if a felony, was merged in the conspiracy, has little vitality in this country. It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and to affix to each a different penalty is well established. *Clune v. United States*, 159 U. S. 590, 594-595. A conviction for the conspiracy may be had though the substantive offense was completed. See *Heike v. United States*, 227 U. S. 131, 144. And the plea of double jeopardy is no defense to a conviction for both offenses. *Carter v. McClaughry*, 183 U. S. 365, 395. It is only an identity of offenses which is fatal. See *Gavieres v. United States*, 220 U. S. 338, 342. Cf. *Freeman v. United States*, 146 F. 2d 978. A conspiracy is a partnership in crime. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 253. It has ingredients, as well as implications, distinct from the completion of the unlawful project.”

(P. 644):

“Moreover, it is not material that overt acts charged in the conspiracy counts were also charged and proved as substantive offenses. As stated in *Sneed v. United States*, *supra*, p. 913, ‘If the overt act be the offense which was the object of the conspiracy, and is also punished, there is not a double punishment of it.’ The agreement to do an unlawful act is even then distinct from the doing of the act.”

The Supreme Court pointed out that the petitioner was not indicted as an aider or abettor (18 U. S. C., Sec. 550), nor was his case submitted to the jury on that theory, but continues with this language (pp. 646-647):

“* * * And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that ‘an overt act of one partner may be the act of all without any new agreement specifically directed to that act.’ *United States v. Kissel*, 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. United States*, 163 U. S. 632, 657-658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy. *Cochran v. United States*, 41 F. 2d 193, 199-200. Yet all members are responsible, though only one did the mailing. *Cochran v. United States*, *supra*; *Mackett v. United States*, 90 F. 2d 462, 464; *Baker v. United States*, 115 F. 2d 533, 540; *Blue v. United States*, 138 F. 2d 351, 359. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson v. United States*, 62 F. 2d 32, 34. The criminal intent to do the act is established by the

formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under §37 of the Criminal Code, 18 U. S. C., §88. *If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense.*" (Emphasis ours.)

The sentence last quoted above clearly points out that under such circumstances other acts, in furtherance of the conspiracy done by one conspirator, are attributable to the co-conspirator for the purpose of holding him liable for the substantive offense. The court concludes by stating that a different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy.

It is thus seen that the *Pinkerton* case is directly contrary to appellants' contention.

At the time appellants' brief was prepared the Supreme Court had not as yet decided the case of

Blumenthal v. U. S., 332 U. S. 539 (Dec. 22, 1947).

The *Blumenthal* case was an appeal from this Ninth Circuit, the citation being 158 F. 2d 883. There was joined in the *Blumenthal* appeal the other petitioners re-

ferred to in appellants' brief, namely, *Goldsmith, Weiss and Feigenbaum*.

At the time appellants drafted their brief they anticipated that the Supreme Court would, in the *Blumenthal* case, hold that both a felony conspiracy and an alleged misdemeanor conspiracy could not be joined in the same indictment. Appellants contend that the sections of the Act utilizing the words "or to agree to do any of the foregoing," constitute a conspiracy allegation even though contained in a misdemeanor statute.

The Supreme Court, however, on December 22, 1947, held contrary to appellants' views.

The *Blumenthal* case likewise involved a violation of the Emergency Price Control Act, pertaining to the sale of whisky. The significant language of the *Blumenthal* opinion, as applied here, and contrary to appellants' contention, is to be found on page 560, in the footnote:

"18. These include the argument that petitioners were prosecuted under the wrong statute. Section 4(a) of the Emergency Price Control Act makes it unlawful, as a misdemeanor, §205(b), for any person to sell or deliver any commodity in violation of price regulations, 'or to offer, solicit, attempt, *or agree* to do any of the foregoing.' (Emphasis added.) Petitioners regard the prohibitory words 'or agree,' etc., as repeal by implication of the general conspiracy statute, §37 of the Criminal Code, insofar as otherwise it might apply to the acts forbidden by §4(a). There was no 'implied repeal.' Conviction under the general conspiracy statute requires more than mere agreement, namely, the commission of an overt act. See also *Taub v. Bowles*, 149 F. 2d 817; H. R. Rep. No. 827, 79th Cong., 1st Sess., 7-8."

This Court will recall its recent opinion, holding contrary to appellants' present assertion, in discussing a conspiracy to violate the misdemeanor provisions of this same Act, *i. e.*, Emergency Price Control Act of 1942. Attention is recalled to

Blumenthal v. U. S., 158 F. 2d 883 (C. C. A. 9),
aff. 332 U. S. 539.

For further authority holding that the crime of conspiracy is not merged in the completed offense, see:

Lisansky v. U. S., 31 F. 2d 846, cert. den. 279
U. S. 873.

Also:

U. S. v. Simonds, 148 F. 2d 177 (C. C. A. 2).

In passing, we are not unmindful of the case of

Sealfon v. U. S., 332 U. S. 575.

Under the unique circumstances in the *Sealfon* case the second trial of the petitioner, after he had been acquitted on a charge of conspiracy, was held to have amounted to double jeopardy. In other words, the court found that there was an identity of offenses and that the first trial was *res adjudicata* to the subsequent trial for aiding and abetting, under the same facts as where he had been acquitted upon the first trial.

This Circuit has only recently sustained a conviction of joining a conspiracy charge to a substantive charge, which opinion refers to the *Pinkerton* case, *supra*. See:

Nye & Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9,
pp. 853-854).

II.

The Indictment Was Neither Void on Its Face, Nor Otherwise Invalid.

Appellants contend, commencing page 7 of their opening brief, that the indictment was void on its face. This contention has reference to the *caption* of the indictment. A mere reading of this caption will illustrate that the term "February, 1945," was a clerical or typographical error. The caption points out that the grand jury had begun but not finished during the September Term of 1945, and "having continued to sit by the order of this court"; then reference is made to February, 1945. The indictment was returned March 11, 1946. As stated, this error in the *caption* is clerical.

This is a matter fairly coming within the provisions of 18 U. S. C., Sec. 556, pertaining to defects of form in indictments.

We agree with appellants that the *body* of an indictment as distinguished from the *caption* cannot be amended; however, even in the body of the indictment, obvious clerical errors have frequently been held as not fatal.

A case illustrating the distinction between the caption and the body is the following:

Brown v. Hudspeth, 103 F. 2d 958 (C. C. A. 10), in which case the court held that even erroneous statements of time as to when the offense was committed, was not fatal. In the *Brown* case, petitioner contended that the indictment was void because it was found by the grand jury prior to the date it alleged the commission of the crime. The caption utilized the allegations the 7th day of April, 1936, whereas, in the charging part of the indictment the offense was charged to have been committed later, namely, on April 29, 1936. The court, in citing many

cases in support of its position, held contrary to petitioner's contention and stated as follows:

"The caption is no part of the indictment. It is merely the record of the court and errors therein may be corrected by amendment. The fact that the caption contains an erroneous statement as to the time when the indictment was found is not a fatal defect which vitiates the indictment. The rule has been applied to cases where the caption recited that the indictment was found prior to the date the offense was alleged to have been committed."

While the Rules of Criminal Procedure were not in effect when this indictment was returned (their effective date having been March 21, 1946), it is believed that even Rule 7(c) is contrary to the rather technical contention now urged by appellants.

Appellants cite, on page 8 of their brief, the case of *United States v. Kay*. No citation is given. Counsel for appellants has inadvertently indicated that the last paragraph quoted on such page was taken from the court's opinion. A glance at the transcript will indicate that such paragraph was counsel's own argument at time of trial [R. 87].

The case appellants rely upon is *United States v. Carney*, 163 F. 2d 784 (C. C. A. 9).

The *Carney* case does not support appellants' position. There, the attempt to amend was to the *body* of the indictment as distinguished from the *caption*. Efforts were made to change an error from "K-14" to "A-14," with reference to an alleged counterfeited gasoline ration coupon. This Circuit recognized on page 790 of the *Carney* opinion, in the cases cited, that there is a distinction between the *caption* and the *body* of the indictment.

In the case of

U. S. v. Bornemann, 35 Fed. 824,

the court held that a misrecital in the caption of a date, it reading "1885," for "1888," where from the whole record the error appeared to be merely clerical, is not fatal as the caption is no part of the indictment.

To the same effect:

U. S. v. Clark, 125 Fed. 92 (D. C. Pa.);

Lund v. U. S., 19 F. 2d 46 (C. C. A. 8).

In the *Lund* case, by reason of a clerical error, the charge of the offense, even in the body of the indictment, was that it was committed in October, 1925; the information being filed April 8, 1925, correctly the offense should have been charged in October, 1924. The court held that this was not even fatal.

A case holding that an indictment is not invalidated by an obvious error in the repetition of a date, even in the body of an indictment, is that of

Iponnatsu Ukichi v. U. S., 281 Fed. 529 (C. C. A. 9), cert. den. 260 U. S. 729.

Indictments were held good, despite errors existing in same, in the following:

Hogue v U. S., 192 Fed. 918 (C. C. A. 5).

In the *Hogue* case the charge was perjury before a "clerk" rather than "Court," as intended.

Simmons v. U. S., 18 F. 2d 85 (C. C. A. 8).

In the *Simmons* case it was erroneously charged that the grand jury was sworn in "District Court of Oklahoma," when it should have been "Federal District Court."

Attention is also invited to Government's Exhibit No. 40, a certified copy of the District Court's Order for the Continuance of the Grand Jury.

III.

The Indictment Stated an Offense and the Court Committed No Error in Refusing to Dismiss Same.

Commencing on page 9 of Appellants' Opening Brief, the contention is made that the indictment failed to state an offense.

An examination of the indictment will illustrate that the conspiracy count (Count 1) is very specific. It charges that the conspiring commenced on or about July 1, 1943, and continued thereafter until its filing (March 11, 1946). It gave the place; it charged the unlawful conspiring, and then sets forth certain specific paragraphs, from "a." through "k.," alleging not only as to the Emergency Price Control Act of 1942, but also to the therein designated maximum price regulations pertaining to meat, and then followed with several overt acts, namely, from (a) through (r). In the overt acts, dates are mentioned, particular invoices as to their serial number are given, and amounts are designated.

The substantive counts, by way of illustration, Count 2, gave the statutes, the regulation involved, the time and place, the name of the person who had paid to the defendants a sum of money in excess of the maximum ceiling price, the invoice serial number, the amount per pound of the particular meat product as allowed by the regulations as to the date involved. Count 2 is one of the counts charging the sale for over-the-ceiling price.

As an illustration of a count involving a false entry charge, we refer to one of such counts, namely, Count 12. This count is likewise extremely specific. It is difficult to see how any of such counts could have been more specific unless they had been evidentiary.

Allusion is had to appellants' demand for a bill of particulars. Since appellants have discussed this at a later point in their brief, we shall wait to answer that contention at such point.

This Court recently held, with reference to the sufficiency of an indictment and in sustaining same, in the case of

Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9, p. 849),

as follows:

"This general allegation does not stand alone. It is followed by a detailed description of the means by which the conspirators planned to impede, etc., the government's inspection functions. Taken in context, it is sufficiently definite to inform the defendants of the charges against them. It shows 'certainty to a common intent' and greater particularity is not required. *Glasser v. United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 68."

The correct rule for determining the sufficiency of an indictment is as follows:

The indictment need only be a "plain, concise and definite written statement of the essential facts constituting the offense charged."

Rules of Criminal Procedure, Rule 7(c).

As the Supreme Court said in *Hagner v. United States*, 285 U. S. 427, 431-4 (1932):

"The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and

sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.’ *Cochran and Sayre v. United States*, 157 U. S. 286, 290; *Rosen v. United States*, 161 U. S. 29, 34.”

This indictment clearly meets these tests.

For like authority see

Armour Packing Company v. U. S., 209 U. S. 56, particularly pages 83 and 84:

“It is alleged that the indictment is insufficient, in that it fails to set out the kind of device by which traffic was obtained, and of what the concession consisted, and how it was granted. Authorities are cited to the proposition that in statutory offenses every element must be distinctly charged and alleged. * * * But an indictment which distinctly and clearly charges each and every element of the offense intended to be charged, and distinctly advises the defendant of what he is to meet at the trial, is sufficient.

“And in *Ledbetter v. United States*, 170 U. S. 606, 612. Mr. Justice Brown, speaking for the court, said:

“‘Notwithstanding the cases above cited from our reports, the general rule still holds good that upon an indictment for a statutory offense the offense may be described in the words of the statute, and it is for the defendant to show that greater particularity is required by reason of the omission from the statute of some element of the offense.’ ”

This Circuit has sustained an Information which is substantially similar to the charges herein involved and which likewise involve a violation of Maximum Price Regulation No. 169 (beef, etc.), in violation of the Emergency Price Control Act of 1942. See the following:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

Appellants also contend, as an additional ground of objection to the indictment, that it failed to allege that the regulations had been first approved by the Secretary of Agriculture. Appellants fail to cite any authority for this contention; in fact, this was not the requirement until July of 1945.

This contention has been definitely decided adverse to appellants' contention.

See the following:

Superior Packing Company v. Clark, 164 F. 2d 343 (Emer. C. A.);

Ormont v. Clark, 164 F. 2d 354 (Emer. C. A.).

In the last cited case, the *Ormont* opinion, the contention had been urged that the Secretary of Agriculture was required to approve the regulations (including R. M. P. R. 169) prior to their being effective. The court held otherwise, as is noted on page 354 at page 355:

“* * * The reasons for our ruling are fully stated in our opinion in the *Superior Packing Company* case and need not be repeated here. Suffice it to say that upon the authority of that case we are compelled to reject the contention of the complainant in the present case that the regulations which he attacks were void because they constituted action taken by the Administrator with respect to ‘agricultural commodities’ without the prior approval of the Secretary

of Agriculture, in violation of Section 3(e) of the Act.”

If approval of the Secretary of Agriculture was necessary at a later date, an inspection of the Federal Register will illustrate that such approval was obtained.

The following citations with respect to such approval are all on and after the 1st day of July, 1945, and they all refer to Revised Maximum Price Regulation 169. It should be noted that in the instant indictment all the substantive charges were alleged to have taken effect prior to this date, namely, in 1944 and the early part of 1945, and only the first count, the conspiracy count, charges the continuation of the offense to the date of filing the indictment, namely, March 11, 1946.

The following citations, where the approval of the Secretary of Agriculture was obtained with reference to Revised Maximum Price Regulation 169, are but a few of such citations. Many more could be given; we designate the following:

10 F. R. 9878, issued August 8, 1945; approved by Acting Secretary of Agriculture August 4, 1945;

10 F. R. 11801, issued September 13, 1945; approved by Acting Secretary of Agriculture September 10, 1945;

10 F. R. 13113, issued October 19, 1945; approved by Secretary of Agriculture October 11, 1945;

and many others.

Appellants contend that in referring to the Emergency Price Control Act of 1942, there was an omission to designate “as amended.” This is a rather unusual argument. It is obvious that the citation of a statute carries with it all of its amendments; furthermore, but a glance at 50 U. S. C. 901 (this Act) gives the date of its first enact-

ment and its amendments. Paragraph (c) of 901 further states it was again amended June 30, 1944.

The Act in question, namely, 50 U. S. C. 946, designates how the Act may be cited. We quote this section:

“§946. Short title.

“This Act may be cited as the ‘Emergency Price Control Act of 1942.’ June 30, 1942, c. 26, Title III, §306, 56 Stat. 27.”

Appellants fail to cite any authority to the effect that the Act was not in force at the time the offenses are alleged to have occurred, and the Code expressly provides that even the repeal of statute does not affect existing liabilities unless the repeal expressly so provides.

To this effect see:

1 U. S. C., Sec. 29.

It is difficult to see how appellants were in anywise prejudiced by the indictment failing to use the words “as amended,” following the recitation of the Act, and especially is this not required when the Act itself states how it may be cited and therein does not require the utilization of the words “as amended.” Judicial notice could readily be taken and should be taken to such amendments without the necessity of express allegations. The case was tried entirely upon the theory of the amendment to the Act rather than the Act as it was initially promulgated.

The *Chambers* and *Hark* cases, cited by appellants, do not support the contention urged by appellants. In fact in the *Hark* case, a case referring to Price Regulation 169, the Supreme Court held contrary to appellant’s assertion, in reversing the District Court which had quashed the indictment.

On page 12 (A. B.), under the heading “III,” appellants have again raised the same contention with regard to the

absence of alleging "as amended." We feel that we have covered such contentions, excepting that we would like to call the court's attention to the following principles:

It is well settled that even reference to a wrong statute, whether in the caption of the indictment or in the body, does not void the indictment.

To this effect see:

Martin v. U. S., 99 F. 2d 236 (C. C. A. 10);

Biskind v. U. S., 281 Fed. 47 (C. C. A. 6), cert. den. 260 U. S. 731, 28 A. L. R. 1377.

It has also been held that reference to a wrong statute in an indictment does not invalidate the indictment if the acts charged therein are sufficient to constitute an offense under some other statute of the United States.

To this effect see:

Capone v. U. S., 51 F. 2d 609 at 616 (C. C. A. 7), cert. den. 284 U. S. 669;

U. S. v. Hutcheson, 312 U. S. 219 at 229.

"In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute. See *Williams v. United States*, 168 U. S. 382. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman Law but the related enactments which entered into the decision of the district court."

IV.

**There Was No Error Upon the Part of the Court,
Either in Admitting the Income Tax Returns of
the Appellants or in the Testimony Given by In-
ternal Revenue Agents of Their Interviews With
the Appellants in Conjunction With Income Tax
Investigations.**

Commencing on page 13 of their brief, appellants have set forth the section of the Internal Revenue Code and the Treasury decisions pertaining to inspection and utilization of income tax returns and other information so obtained by the Bureau of Internal Revenue. We shall endeavor to make our argument, in answer to these matters, as brief as possible.

In the first place, this Circuit has only recently decided a similar if not an identical question as that now urged, adverse to appellants' contention.

We refer to

Shubin v. U. S., 164 F. 2d 377 (C. C. A. 9).

The *Shubin* case was tried on an indictment that was substantially the same as the instant indictment. It was likewise tried before the Honorable J. F. T. O'Connor; it was a case that preceded, in point of time, the instant case by but a few days. It likewise involved a conspiracy charge to violate the Emergency Price Control Act of 1942, together with the pertinent Maximum Price Regulations pertaining to meat products. The substantive charges in the *Shubin* case were virtually the same as those involved in the instant case.

Appellants in the *Shubin* case raised similar contentions to those now being urged in the instant case, with respect to the introduction of income tax returns and statements

which they had voluntarily given to the agents of the Bureau of Internal Revenue. This Circuit held adverse to the contentions there urged and held that the court ruled correctly in admitting such testimony.

In the instant case attention is invited that the witness Segal voluntarily, and not in response to any subpoena, appeared before an agent of the Bureau of Internal Revenue, on or about June 9, 1945, and gave a statement [R. 246]. He was advised that he was not required to make the statement; that he had a right to be represented by an attorney or an accountant, and apparently freely and voluntarily gave such statement [R. 246], in which statement appellant Segal made certain admissions that were utilized in the instant trial.

This statement was Government's Exhibit 33. The testimony of the Internal Revenue Agent Bircher was only given after full and complete authority had been obtained as is required by 26 U. S. C., Sec. 55, and the pertinent regulations under the Treasury decisions.

It should be noted that this testimony was limited as to the appellant Segal [R. 302-304].

Internal Revenue Agent Phoebus gave certain testimony concerning conferences that he had had with the appellants, Stillman and Segal [R. 297 through 308]. Government Agent Phoebus likewise had authority for so testifying.

Appellants contend that the receipt in evidence of testimony of the admissions so made by the appellants violated the Fifth Amendment by compelling them to testify against themselves, and primarily cite in support of their contention *Counselman v. Hitchcock*, 142 U. S. 547. The *Counselman* case is not at point. In that case the witness had been compelled to appear before a grand jury and there refused to give testimony which might tend to incriminate

him, since no immunity was guaranteed. An element of *compulsion* was present in the *Counselman* case. Such is not true here. The record clearly shows that the admissions or statements made by both Stillman and Segal were voluntary and were without any element of compulsion. There was no evidence offered to the contrary. Witness Segal seemed to be anxious to adjust his income tax difficulties even though by so doing he admitted violating ceiling prices established by OPA. He admitted the receipt of sizeable sums of money as "side money" [R. 276, 277 and 279]. Apparently appellants were not concerned with their wilful violations of the OPA law and its regulations but were concerned over their possible tax frauds.

Segal was given an appropriate warning and given the right to refuse to speak or to incriminate himself [R. 246].

In this case we find that all of the requirements were met, to allow the United States Attorney to use the documents and testimony of the agents, as is called for by the statute, for official use. There was thus compliance with every provision of the law and regulation, and the information and documents of the Internal Revenue Agents were duly made available to the Government in conformance with legal requirements.

There was precedence for this procedure. We believe that it is sufficient to set forth such cases with but brief comment:

Gibson v. U. S., 31 F. 2d 19 (C. C. A. 9), cert. den. 279 U. S. 866;

Greenbaum v. U. S., 113 F. 2d 113, 126 (C. C. A. 9);

Lewy v. U. S., 29 F. 2d 462, 464 (C. C. A. 7), cert. den. 279 U. S. 850;

Lewis v. U. S., 38 F. 2d 406 (C. C. A. 9).

In the *Gibson* case the indictment charged a conspiracy to violate the National Prohibition Act. In support of its case the Government there introduced in evidence, over objection, an affidavit made by the defendant six months after the return of the indictment, and which had been delivered to a Deputy Collector of Internal Revenue with the assurance on the part of the Deputy that it would be considered as only bearing on his income tax obligation.

In admitting the testimony with reference to this affidavit, the court pointed out that the Deputy Collector was incompetent to waive such right and held the same admissible, as is indicated on page 22 of the *Gibson* case.

We have indicated that no compulsion was exercised against either of the appellants. It is the opinion of the appellee that the law governing is not that as designated in the *Counselman* case or the *Monia* case, which last mentioned case also referred to testimony given before a grand jury in obedience to a subpoena; but that the law is governed by principles indicated in cases dealing with the distinction between *admissions* and *confessions* and the admissibility of such testimony under such circumstances.

A case sustaining the introduction of *admissions* made to a police officer after the defendant's arrest, even when the defendant appeared to be nervous and jittery and was under the influence of liquor, and was not even warned that such statements might be used against him and had not been charged with any crime, is the case of

Morton v. U. S., 147 F. 2d 28 (C. A. D. C.), cert den. 324 U. S. 825.

The *Morton* case clearly recognizes that the rule with regard to the receipt in evidence of *admissions* are much less onerous than those concerning confessions. After reciting the facts as above noted, the court, on page 31, states as follows:

“* * * Even a confession, given under such circumstances, would have been admissible. The rules governing the reception in evidence of admissions are much less onerous than those concerning confessions. *There was no reason for an instruction as to the difference between an admission and a confession. That was a question of law, not for the jury, but for the trial judge.* There was no reason for an instruction on what constitutes an involuntary confession, because no confession was offered or received in evidence.” (Citing many cases in the footnotes.) (Emphasis ours.)

It is thus seen that in the instant case the *admissions* made by appellant Segal, and even the slight admissions made by the appellant Stillman long before the return of this indictment, and made to agents investigating their income tax liabilities, were not in the nature of confessions but were in the nature of admissions; consequently, there was no duty upon the part of the court to have submitted to the jury the instructions as proposed by the appellants, particularly those set forth on pages 31 and 32 of Appellants' Opening Brief.

A reading of the testimony as is reflected in Government's Exhibit 33—the statement of the appellant Segal—will clearly denote that it was not a confession of the crime charged in this indictment; it amounted to attempted explanations of certain moneys he had received as so-called “gifts” from customers paying him sums of money in

addition to the ceiling price on meats sold. It was of a general nature and did not cover any of the specific charges contained in this indictment, this indictment having been filed about nine months later, namely, in March of 1946.

Even though the statements made by appellants Stillman and Segal to the Internal Revenue Agents might be classified as confessions, still, the following authority justifies their introduction. See:

U. S. v. Bayer, 331 U. S. 532 (particularly on p. 539).

Radovich, one of the appellants who had served with distinction in the Air Forces of the United States Army, was ordered to report to Mitchell Field. He was placed under arrest and confined to the Psychopathic Ward. He was denied callers and communication with others. While under such constraint he made a first confession. This, the Supreme Court held, they would assume was inadmissible. At a later date, Radovich made a second confession to an FBI Agent. At the time of making the second confession he was confined to the Base. He volunteered facts that were not disclosed in the original statement or confession. He was warned that the second statement might be used against him. He requested the original statement—the one that had been taken while he was restricted—and the second one was labeled a supplementary statement and was basically the same as the first. The court permitted the introduction of the second statement although he urged that it was the fruits of the earlier one, and on page 541 of the *Bayer* case stated as follows:

“* * * The second confession in this case was made six months after the first. The only restraint under which Radovich labored was that he could not leave the base limits without permission. Certainly

such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession voluntarily given after fair warning invalid as evidence against him. We hold the admission of the confession was not error. *Cf. Lyons v. Oklahoma*, 322 U. S. 596.”

The attitude of the Supreme Court with respect to admissions of guilt and the propriety of receiving such in evidence, and the differentiation from the principles announced in the *McNabb* case, is illustrated in the following:

U. S. v. Mitchell, 322 U. S. 65.

In the *Mitchell* case, admissions made immediately after the arrest were held proper and such statements were not nullified, although after making the statements Mitchell was held for eight days before he was arraigned, the court pointing out that the illegality of the contention does not retroactively change the circumstances under which the disclosures were made.

This Circuit has held, subsequent to the *McNabb* and *Anderson* Supreme Court decisions, that testimony is admissible of statements made by the accused to an FBI Agent before any charges had been filed against the accused, where there was no showing of any mistreatment or anything of a negative nature to their being but free and voluntary. To this effect:

Cohen v. U. S., 144 F. 2d 984 (C. C. A. 9).

This Circuit has also held that there is no presumption against a confession and no burden upon the Government to establish its voluntary character.

To this effect see:

Gray v. U. S., 9 F. 2d 337 (C. C. A. 9) 339:

“* * * It is the rule in the federal courts that the fact that a confession is made by an accused person even while under arrest or when drawn out by the questions of an officer does not necessarily render it involuntary. There is no presumption against a confession and no burden upon the government to establish its voluntary character. *Murphy v. United States* (C. C. A.), 285 F. 801, 807; *Sparf v. United States*, 156 U. S. 51, 55 S. Ct. 273, 39 L. Ed. 343; *Perovich v. United States*, 205 U. S. 86, 91, 27 S. Ct. 456, 51 L. Ed. 722.”

Even where a defendant denies his guilt and he makes exculpatory statements, such statements are admitted as admissions and the cases hereunder noted point out that the rule with regard to reception of admissions is less onerous than those concerning confessions.

To this effect:

Ercoli v. U. S., 131 F. 2d 354 (C. A. D. C., p. 356);

Beck v. U. S., 140 F. 2d 169 (C. A. D. C.).

It is therefore submitted that the testimony containing admissions upon the part of appellants was clearly admissible. This testimony, including the statement given by Segal, was not in the nature of confessions but rather that of admissions that had been voluntarily made.

V.

**The Evidence Was Entirely Sufficient to Justify the
Verdict as to Each Count.**

There are certain well-established rules governing appeals. Before discussing in detail certain of the contentions urged by appellants with regard to the contended insufficiencies of the evidence, we feel that it will not be amiss to digress and set forth a few of these principles. They are as follows:

1. Appellate courts will indulge all reasonable presumptions in favor of the trial court and draw all inferences permissible from the record, in determining whether the evidence is sufficient to sustain a conviction.

To this effect:

Henderson v. U. S., 143 F. 2d 681 (C. C. A. 9).

2. Appellate courts will rarely substitute its views on the weight of the evidence for those of the jury, even though the appellate court might have reached a different conclusion.

To this effect see:

Jordan v. U. S., 87 F. 2d 64 at p. 67 (C. A. D. C.).

3. Normally, the sufficiency of the evidence is a jury question. A fairly recent case in support of this proposition, and pointing out that the appellate court is not called upon to weigh conflicting testimony but only to determine whether there was some evidence competent and substantial before the jury, fairly tending to support the verdict, is

Hemphill v. U. S., 120 F. 2d 115 (C. C. A. 9), cert.
den. 314 U. S. 627.

To like effect:

Crumpton v. U. S., 138 U. S. 361.

In view of the above well-settled principles, an analysis of the testimony will clearly show that there was sufficient evidence before the jury to have found the existence of a conspiracy upon the part of both Stillman and Segal. They were both engaged in the same common enterprise. The testimony clearly shows that Segal told several retail meat merchants that they would have to pay a sum of money in excess of the ceiling price; that Stillman did likewise, as to at least one of such merchants, the witness Muehlberger [R. 90 and 93]. The evidence shows that the invoices did not reflect the true price as to those counts pertaining to false entries, and likewise as to the count pertaining to the alteration of the books of the partnership, Count 32.

The evidence also shows that there was the existence of a partnership, first under the name of the Southern California Meat Company No. 2, existing between Stillman and Segal, commencing in August of 1944, and following which an additional partnership existed between Stillman, Segal and Rosensweig, commencing about January of 1945, under the name of Central Packing Company.

Appellants contend that there is no proof of an unlawful agreement. This Circuit, and others, has repeatedly held that the proof of an unlawful agreement may be had by circumstantial evidence. To such effect see the often quoted case of

Marino v. U. S., 91 F. 2d 691 at p. 694 (C. C. A. 9).

In a very recent case from this Circuit, this rule is again announced. See:

Nye & Nissen v. U. S., 168 F. 2d 846 (C. C. A. 9).

This Court, on page 852 of the *Nye & Nissen* opinion, stated as follows:

“The existence of a conspiracy may be inferred from acts of persons which are done in pursuance of an apparent criminal purpose. *Blumenthal v. United States*, 9 Cir., 158 F. 2d 883, affirmed 332 U. S. 539, 68 S. Ct. 248.

* * * * *

“Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect a defendant with it. *Meyers v. United States*, 6 Cir., 94 F. 2d 433, certiorari denied 304 U. S. 583, 58 S. Ct. 1059, 82 L. Ed. 1545; *Phelps v. United States*, 8 Cir., 160 F. 2d 858. The evidence here is more than slight.”

A case additionally to point is the following:

Braverman v. U. S., 125 F. 2d 283 (C. C. A. 6)
(reversed on other grounds, 317 U. S. 49).

In the *Braverman* case the rule with respect to reasonable inferences that may be drawn from all the facts and circumstances, to show the existence of the conspiracy, is noted in the following language (p. 286):

“The rule of our circuit and others was clearly stated and approved by Mr. Justice Sutherland, retired, with whom sat the present Chief Justice and Circuit Judge Clark in *United States v. Manton*, 2 Cir., 107 F. 2d 834, 839: ‘It is not necessary that the participation of the accused should be shown by

direct evidence. The connection may be inferred from such facts and circumstances in evidence as legitimately tend to sustain that inference. Indeed, often if not generally, direct proof of a criminal conspiracy is not available and it will be disclosed only by a development and collocation of circumstances. In passing upon the sufficiency of the proof it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it. *Hodge v. United States*, 6 Cir., 13 F. 2d 596; *Fitzgerald v. United States*, 6 Cir., 29 F. 2d 881."

It is, of course, well settled that co-defendants may be liable even though they only aid and abet one another. This principle is statutory.

18 U. S. C., Sec. 550.

There are many cases construing this point, including the previously cited case of *United States v. Pinkerton*, 328 U. S. 640 at p. 647.

This principle is acknowledged in this Circuit in the *Nye & Nissen* case, *supra*, page 854 of the opinion.

Additional authorities upon the principle of holding joint confederates liable for the acts of the confederate, even under substantive charges upon the theory of aiding and abetting, are the following cases:

Bossa v. U. S., 330 U. S. 160 at p. 164;

Borgia v. U. S., 78 F. 2d 550 (C. C. A. 9), cert. den. 296 U. S. 615;

U. S. v. Okweiss, 138 F. 2d 798 at p. 800 (C. C. A. 2), cert. den. 321 U. S. 744.

VI.

The Court's Instruction With Respect to the Maximum Ceiling Price Allowed for the Meat, Was a Correct Statement of the Law.

It is difficult to see how counsel for appellants can now complain of this instruction. Our search of the transcript fails to reveal either a general or specific objection to this particular instruction. In fact, the record reveals that counsel for appellants did, in effect, stipulate that the figures of the price noted per pound on the invoices of meat sold were the maximum ceiling prices, or that the witness would so testify.

A review of the testimony of the witness Edward F. Cunningham [R. 288 to 291] reveals that Cunningham, a Specialist from the OPA, was called upon to examine all of the invoices of the Government's exhibits that had theretofore been introduced into evidence, namely, the invoices of certain specific sales to the merchants who had purchased meat from the appellants. Counsel for the Government stated that the witness Cunningham would testify, as to each invoice, that the prices shown thereon were the maximum ceiling prices for such meat items on those particular dates, to which counsel for appellants stated, "We will so stipulate, your Honor, and shorten this line of testimony" [R. 290].

Even though appellants should continue to object to this instruction we feel that the law is definitely adverse to their contention, as is illustrated in a rather recent case from this Circuit, namely:

Flannagan v. U. S., 145 F. 2d 740 (C. C. A. 9).

The *Flannagan* case points out that a publication in the Federal Register of a maximum price regulation creates a rebuttal presumption of notice to one subsequently selling beef at a lower price, and further points out as follows (p. 742):

“There is no merit in the objection. A willful sale at an excessive price necessarily implies a specific intent to sell it at such a price. The court had previously instructed the jury that the applicable maximum was 22¼ cents per pound. No objection was made as to the amount, but it was objected that the court could not state it and that the jury alone must figure it from the provisions of the regulation. The court properly overruled the objection. The regulation, having the force of law, determines the maximum price. Hence it was proper for the court to advise the jury what was the amount so legally fixed.”

The *Flannagan* case is also authority to the contention urged by appellants with regard to the element of intent, for in such case this Circuit held that a wilful sale at an excessive price necessarily implies specific intent to sell it (meat) at such price.

In replying to appellants' present objection to the court's instruction as to maximum ceiling prices allowed for the sale of the meat, we are not unmindful of a late decision of this Circuit, *i. e.*,

Saul Samuel, et al., v. U. S., 169 F. 2d 787 (C. C. A. 9).

The *Samuel* case is distinguishable from the instant case. The *Samuel* case involved a conspiracy charge regarding the sale of whisky; three separate statutes were charged to have been violated. In the instant case no objection

appears to have been made to the court's instruction now complained of; furthermore, this instruction is a correct statement of the law and the relevant regulations. In the *Samuels* case the trial court had erroneously defined one of the three laws involved in the conspiracy charge, hence there was no way of determining whether the verdict was based upon a correct or incorrect instruction.

VII.

No Reversible Error Occurred, Either in the Admission or Exclusion of Evidence.

Commencing on page 38 of appellants' brief, argument is made with respect to certain evidence admitted and certain evidence excluded.

It is not the desire of appellee to specifically go over all of the evidence to show why the court's rulings were proper. In our Statement of Facts we have endeavored to but summarize the evidence; however, we feel that a reading of the transcript will clearly reveal that no reversible error occurred in the matters now singled out by appellants.

The complaints now urged go more to the weight than the admissibility of the evidence. By way of illustration each of the witnesses, the retail meat merchants, testified that they paid an additional sum per pound over and above that reflected on the invoice. This was not a question of any foundation having to be laid. It was a matter of the best recollection of the witness.

No error was made in admitting the testimony of Phoebus, Agent of the Bureau of Internal Revenue. We have heretofore shown, in our Statement of Facts, that authority was requested and obtained for this Agent to

testify. He testified concerning relevant admissions that had been voluntarily made to him by the appellants. No compulsion had been used, nor had any promise been held forth.

The books of the California Meat Company had been given to witness Phoebus by one of the appellants, Stillman, in response to a request upon the part of the witness Phoebus to be permitted to inspect these records [R. 295 and 297].

No error was committed by reason of the testimony of the witness Namson. This witness testified as to certain conversations Stillman and Segal had had in his presence. These conversations contained material admissions. Witness Namson was a private person, not a Government agent. There is nothing to show but what such statements made by Stillman and Segal were other than free and voluntary.

On page 40, appellants set forth three proposed instructions which the court did not give. A reading of the record will show that each and every material element involved in the case was clearly covered by the court's very ample instructions. It should be recalled that neither of the appellants took the stand. All affirmative evidence came from Government witnesses.

The instructions set forth, which the court refused to give, were either entirely covered by other instructions or else were of such a character that it would not have been proper to have given them. In the first place, while good faith is a defense in a charge such as a mail fraud case, still, in a case of this character where the evidence clearly shows that both defendants suggested to purchasers that they would have to pay an over-ceiling price per pound for

meat before they could obtain it, the element of good faith was not even present. No testimony upon the part of appellants existed in the record which would tend to show they were even operating under good faith. This Court has held in a like case, namely, that of selling beef for over-ceiling price, that a wilful sale at excessive price necessarily implies specific intent to sell at such price. To such effect:

Flannagan v. U. S., 145 F. 2d 740.

It is well settled that instructions must be considered in their entirety and that if the entire instructions cover all essential elements, no prejudice results. To this effect see:

U. S. v. Sorcey, 151 F. 2d 899 (C. C. A. 7);

Taylor v. U. S., 142 F. 2d 808 at p. 817 (C. C. A. 9), cert. den. 323 U. S. 723.

To the same effect:

Hargreaves v. U. S., 75 F. 2d 68 at p. 73 (C. C. A. 9), cert. den. 295 U. S. 759.

“It is a well-settled principle of law that in determining the correctness of instructions, detached phrases and sentences cannot be singled out and considered alone, but must be construed with their context. *Colt v. U. S.*, 190 F. 305, 308 (C. C. A. 8); *Michael v. U. S.*, 7 F. 2d 865, 866 (C. C. A. 7).”

The rule with respect to instructions is well announced in a rather recent case, namely:

Pine v. U. S., 135 F. 2d 353 at p. 355 (C. C. A. 5), cert. den. 320 U. S. 740.

Even if error occurs in part of the instruction, such error is not reversible, if it is cured by a subsequent charge or by a consideration of the entire charge.

To this effect:

Clarke v. U. S., 132 F. 2d 538 (C. C. A. 9), cert. den. 318 U. S. 789.

The rule is also well settled that when the evidence as a whole is convincing toward the defendant's guilt, reversible error does not necessarily occur from an erroneous instruction; to this effect:

Roubay v. U. S., 115 F. 2d 49 (C. C. A. 9).

VIII.

The Court Did Not Err in Refusing to Grant Defendants' Request for a Bill of Particulars.

It has heretofore been pointed out that this indictment was quite specific. It was surely sufficiently definite to inform the defendants of the charges against them.

It is well settled that a bill of particulars is properly denied where the indictment is reasonably definite as to the offense charged. To this effect:

Robinson v. U. S., 33 F. 2d 238 (C. C. A. 9).

And the true rule is, that the discretion of the court in denying a bill of particulars is not reviewable except in a case of abuse of discretion.

To this effect see:

Wong Tai v. U. S., 273 U. S. 77.

Quotation from two opinions which we feel are most appropriate, are the following:

Nye & Nissen v. U. S., 168 F. 2d 846 at p. 851 (C. C. A. 9).

“It is elementary, of course, that the denial of a bill of particulars is not ground for reversal if it does not amount to an ‘abuse of discretion.’ *Wong Tai v. United States*, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545. We agree with appellee that the indictment here is an exceedingly specific document, and that no abuse of discretion is shown to have resulted from the trial court’s refusal to compel disclosure of further particulars. Although it may be true that defendants could not have known in advance of trial what various facts and circumstances were to be relied upon by the government as proof of the alleged conspiracy, this does not necessarily indicate that they were prejudiced by the denial of their motion. The government should not be compelled by a bill of particulars to make a ‘complete discovery’ of its entire case. *Braatelen v. United States*, 8 Cir., 147 F. 2d 888; *Rubio v. United States*, 9 Cir., 22 F. 2d 766, certiorari denied 276 U. S. 619, 48 S. Ct. 213, 72 L. Ed. 734.”

Kempe v. U. S., 151 F. 2d 680 at p. 685 (C. C. A. 8).

“* * * As heretofore shown, the information referred specifically to the regulations and the statutes involved. The purpose of a bill of particulars is to secure facts, not legal theories. *Rose v. United States*, 9 Cir., 149 F. 2d 755, 758; *Flannagan v. United States*, *supra*.

“In Braatelen, *et al.*, v. United States, 8 Cir., 147 F. 2d 888, 892, this court said: ‘Moreover, a motion for a bill of particulars is addressed to the sound discretion of the court and, unless it is made to appear that this discretion has been abused, the ruling will not be reversed. *Hartzell v. United States*, 8 Cir., 72 F. 2d 569, 575; *Pines v. United States*, 8 Cir., 123 F. 2d 825, 829.’

“We are convinced that the defendant was not lacking as to information of the acts charged to have been committed by him and the regulations and statutes violated thereby. Thus the court did not err in overruling the motion for a bill of particulars.”

Under this same heading, that is, on page 41, and thereafter, of appellants’ brief, other contentions are urged in addition to those with respect to a bill of particulars. These are repetitions of contentions previously urged by appellants; we feel that we have covered them at other portions of this brief.

One contention which, however, is rather unique, is to the effect that there is no evidence of the promulgation or publication of these regulations in the Federal Register. This is not required. The court will take judicial notice of such publication. Defendants in this case were charged with knowledge of such regulations. Their publication created a rebuttable presumption of notice to the defendants. Such is so declared by statute 44 *U. S. C.*, Sec. 307. Also, to like effect:

Flannagan v. U. S., *supra*.

IX.

The Court's Ruling in Denying Both the Motion for Judgment of Acquittal and the Motion in Arrest of Judgment, Was Proper.

On page 43, appellants set forth reasons why they feel a motion in arrest of judgment should have been granted. All of these various six grounds as there designated have been heretofore covered and answered in this, appellee's brief. We have endeavored to illustrate why such contentions were untenable and not grounds for reversal.

On page 42, appellants contend that a motion for acquittal should have been granted for reasons that have previously been advanced by appellants in their brief, that is, for the contended insufficiency of the evidence, etc.

As we have heretofore pointed out, no affirmative evidence was offered by the appellants. There was certainly sufficient evidence introduced to support the jury's verdict of the existence of the conspiracy, to show guilty knowledge upon the part of both appellants, and to support the jury's verdict as to the substantive counts wherein each appellant was found guilty. It would serve no useful purpose to further review such evidence. It has been summarized in our Statement of Facts.

This Court is of course well aware that with respect to a motion for directed verdict, which is the same as the newer motion for a judgment of acquittal, the rule is that the defendant's guilt should be submitted to the jury if there

is any "proper," "legal," "competent," or "substantial" evidence sustaining the charge. To this effect:

Maugeri v. U. S., 80 F. 2d 199 at p. 202 (C. C. A. 9).

"As to the requests for a directed verdict, it is well settled that, on motion for a directed verdict for the defendant in a criminal case, if there is any 'proper,' 'legal,' 'competent,' or 'substantial' evidence sustaining the charge, it should be submitted to the jury."

To the same effect:

Gorin v. U. S., 111 F. 2d 712 at p. 721 (C. C. A. 9), affirmed 312 U. S. 19.

It is well settled that where a motion for a directed verdict is made, the Appellate Courts must view the evidence in the light most favorable to the appellee. This Circuit has so ruled. Also see:

Canella v. U. S., 157 F. 2d 470 (C. C. A. 9);

Borgia v. U. S., 78 F. 2d 550 at p. 555 (C. C. A. 9), cert. den. 296 U. S. 615.

We have heretofore called attention that the sufficiency of the evidence is a jury question.

To this effect:

Hemphill v. U. S., 120 F. 2d 115 (C. C. A. 9), cert. den. 314 U. S. 627;

Yoffe v. U. S., 153 F. 2d 570 (C. C. A. 1).

Conclusion.

It is respectfully submitted that there was substantial evidence supporting the verdict of guilty, of the appellants, on the counts of which they were found guilty.

No error of a reversible nature occurred at the trial.

In view of the foregoing, and in view of the contentions urged in this, Appellee's Reply Brief, it is respectfully submitted that the verdict and judgment as to both of the appellants should be affirmed.

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APPENDIX.

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides (7 Fed. Reg. 10381, as amended, issued December 10, 1942, effective December 16, 1942):

“Section 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *

Section 1364.407 Records and reports. * * *

“(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to

this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor. * * *

“Section 1364.401. Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.

No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

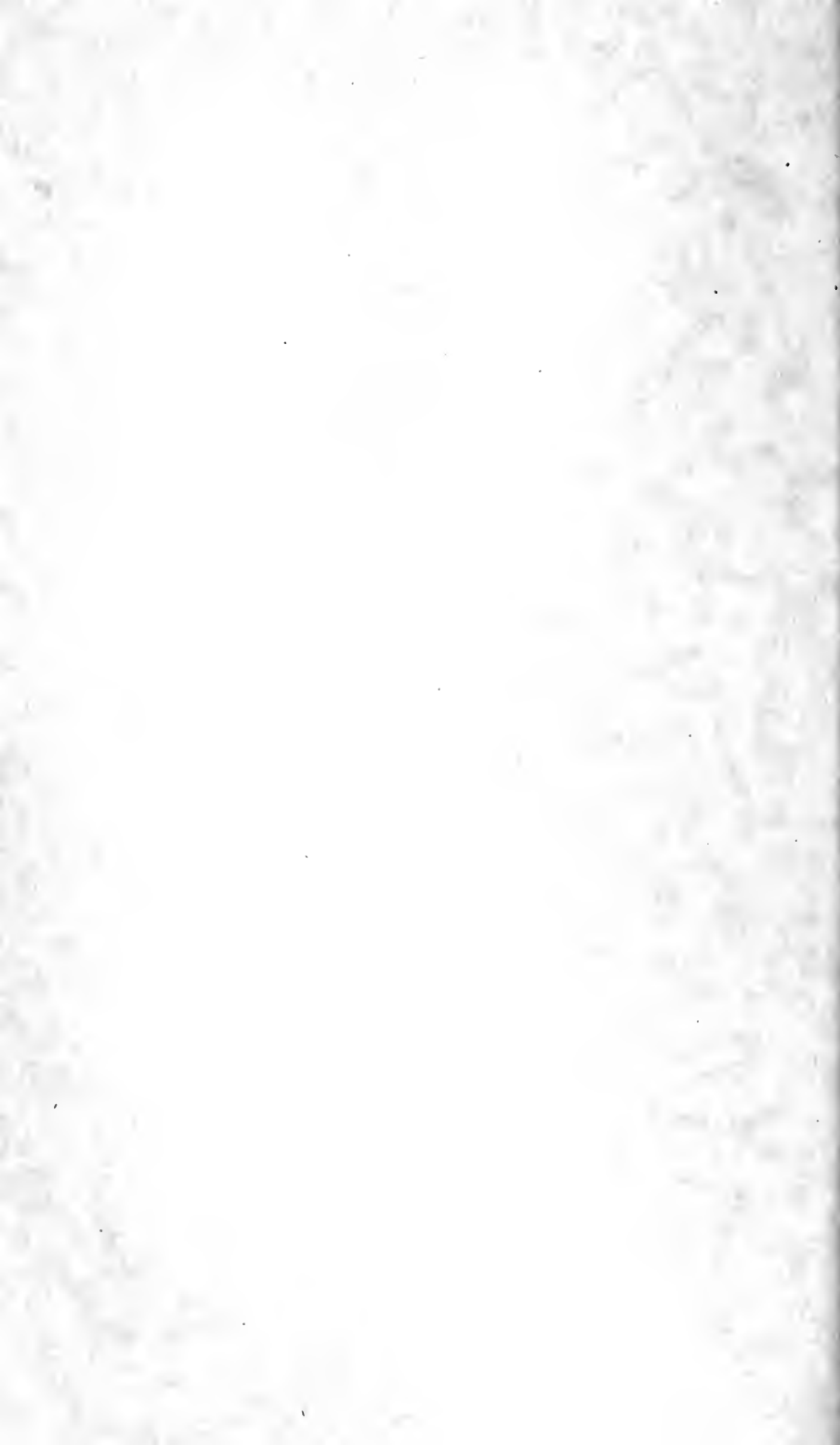
Appellee.

CLOSING AND SUPPLEMENTAL BRIEF FOR APPELLANTS.

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Appellants,

vs.

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**CLOSING AND SUPPLEMENTAL BRIEF
FOR APPELLANTS.**

*To the Honorable the Justices of the United States Court
of Appeals for the Ninth Circuit:*

Come now the appellants, Hyman Stillman and Lou Segal, and file this supplemental brief in the above entitled cause, with leave of court.

Since the filing of the opening brief several cases have been decided, which are helpful, and perhaps decisive, in the determination of this appeal. It is, therefore, necessary to file this supplemental brief in order to cover the points presented.

We think this court's learned opinion in *Samuel v. United States*, 169 F. 2d 789, decided August 24, 1948, in which this court holds that the giving of a wrong law is not less prejudicial than the omission to give the law at all, is decisive of one of our points in this case regarding the faulty instructions, and we shall discuss it later.

I-A.

Indictment Invalid.

In respect to the invalidity of the indictment, the Government correctly calls the Court's attention to the fact that our citation of *United States v. McKay* was omitted in the printing. We call the Court's attention to the citation of *United States v. McKay* in 45 Fed. Supp. 1007, 1015.

We also call the attention of this Court to the following authorities: *Roche v. Evaporated Milk Association*, 319 U. S. 21, pp. 26-27, and to the prior case of *Evaporated Milk Association v. Roche*, 130 F. 2d 843, in which this Court considered the question of the expiration of the Grand Jury, and held that the issue was jurisdictional within the meaning of 28 U. S. C. A., Sec. 879.

While the decision in the *Roche* case turned upon the power to issue a writ of mandamus, this Court nevertheless discussed the authority of a Grand Jury indictment which was, or could be, void because not brought in accordance with the statutory provisions regarding the authority of the Grand Jury to act. This Court, in its footnote, commented upon *United States v. Johnson*, 123 F. 2d 111, at 117, holding that a Grand Jury which did not sit within the required terms was illegally constituted. The Court, in *United States v. Johnson, supra*, at page 118, said as follows:

“No question is raised by the Government but that compliance with the provision is essential in order to give a Grand Jury vitality subsequent to the term at which it is originally empaneled. Moreover, in view of the fact that all inferior courts of the United States are of limited jurisdiction and possess only such power and authority as are expressly conferred,

no question could well be raised in this respect. As was said in *Re Mills*, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 763, 34 L. Ed. 107: “* * * A grand jury, by which presentments or indictments may be made for offenses against the United States is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal. * * *”

“If a court is without authority to empanel a Grand Jury except as the same is expressly conferred by Statute, it would seem to follow inevitably that a Grand Jury empaneled could only have its authority or power continued to a subsequent term by strict compliance with the statutory provision. The language of the provision plainly limits the authority of the court to continue a Grand Jury to sit ‘during the term succeeding the term at which the request is made,’ and with equal clarity limits the continuance ‘solely to finish investigations begun but not finished by such grand jury.’”

Section 421 (Jud. Code, Sec. 284), as amended April 17, 1940, ch. 101, 54 Stat. 110, provides as follows:

“* * * The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months:” etc.

Implicit in the decision of *United States v. Johnson, supra*, is the holding that the indictment must be returned by a Grand Jury having statutory authority and that *the language of the indictment controls the Court in the authority of the Grand Jury to act.*

In the *Johnson case*, 319 U. S. 503, 87 L. Ed. 1546, at 1554-1555, the Court said:

“The indictment itself alleged that the grand jury ‘having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to sit by order of this court . . . during the February and March Terms . . . for the purpose of finishing investigations begun but not finished during said December Term.’ The court below was apparently of the view that a mere denial of *such a solemn allegation by the grand jury puts its truth in issue*, that the burden is upon the government ‘to support it with proof,’ and that failure to vindicate the authority of the grand jury is ‘fatal.’ ”

Our situation is the reverse. The indictment itself makes a solemn allegation by the very language of which it would *lack jurisdiction to act*. The indictment was returned as a “*True Bill*.” There is no presumption of error on the face of the indictment, nor can the indictment itself be changed without invalidating it.

Ex parte Bain, 121 U. S. 1;

Evaporated Milk Association v. Roche, 130 F. 2d 843;

Edgerton v. U. S., 143 F. 2d 697.

If the Court had attempted to strike out the “5” from the indictment and change it to read “6” or “7”, this would have vitiated the indictment.

Ex parte Bain, 121 U. S. 1;

Albrecht v. U. S., 273 U. S. 1;

Edgerton v. U. S., 143 F. 2d 697;

Evaporated Milk Association v. Roche, 130 F. 2d 843, 851;

Carey v. U. S., 163 F. 2d 784.

If, then, the Court could not strike the date or change it, the Court had no power to disregard it and, therefore, the indictment was fatally defective in its very language.

In *United States v. McKay*, 45 Fed. Supp. 1007, at 1015, the Court said:

“A United States District Court is one of limited jurisdiction with only such powers as are expressly conferred by statute. The grand jury sitting in such a court is strictly a creature of statute. In *re Mills*, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 34 L. Ed. 107. There is no such thing as a *de facto* grand jury in a Federal Court. Its original life and authority to act, and any continued existence which it may have after the expiration of the term for which it was impaneled, depends strictly upon statutory authority, and unless that authority is complied with there is no jurisdiction to return an indictment.”

In *United States v. Enoch L. Johnson*, No. 384-X, the Third Circuit on June 19, 1941, quashed an indictment upon a plea in abatement on the ground that the Grand Jury was without authority. This case is reviewed in 39 Fed. Supp. 965, by Circuit Judge Maris. Since the

Grand Jury's work must be regarded with all solemnity, any effort to alter the indictment must necessarily vitiate it.

The case cited by respondent regarding errors in the "Caption of the Indictment" on pages 23-25 of the Reply Brief are not applicable here and are antediluvian authorities, so old, they have grown whiskers longer than on Uncle Sam. Many of them are District Court cases which go back as far as *United States v. Borneman* in 1888, when the district judges traveled in circuits. These are all sufficiently answered by the opinion of the United States Supreme Court in *United States v. Johnson*, decided June 7, 1943, 319 U. S. 503, wherein the Supreme Court points out that:

"The indictment itself alleged that the grand jury 'having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to suit by order of this Court . . . during the February and March Terms . . . for the purpose of finishing investigations begun but not finished during said December Term.' The court below was apparently of the view that a mere denial of such a solemn allegation by the grand jury puts its truth in issue, that the burden is upon the government 'to support it with proof,' and that failure to vindicate the authority of the grand jury is 'fatal'."

Here then was a solemn allegation by the grand jury alleging the authority of the grand jury to act at a time when it would otherwise have no authority to act, and under the language of this "solemn allegation by the grand jury" there could be no presumption that that body of men made a mistake or that the indictment labeled a

“True Bill” was a false bill or an erroneous one or mistaken one.

Grand juries are creatures of statute. They cannot act when their own allegations say that they are powerless to act. This is not a mere “caption” to be changed at will, but, as the Supreme Court of the United States says, it was a solemn allegation by the grand jury. Even under one of the cases cited by the respondent, *U. S. v. Clark*, 125 Fed. 92, the Court there held that if there was a mistake of the draftsman these were mistakes that could be corrected. In that case “the exception to the caption is sustained with leave to the government to amend.” Even this view would sustain our contention that in our case, after objection made to the indictment, no effort was made to amend (assuming that that could be done). This circuit has held that an indictment may not be amended in any particular (*Ex parte Bain*, 121 U. S. 1; *Edgerton v. U. S.*, 143 F. 2d 697; *Carney v. U. S.*, 163 F. 2d 784).

An indictment, as pointed out in *U. S. v. Johnson, supra*, is a solemn allegation by the grand jury, and if an error crept in it cannot stand, any more than could the indictment in *U. S. v. Carney*.

I-B.

The Indictment Fails to State a Public Offense.

In their contention that the indictment stated an offense, the respondent again concedes that the statute throughout the indictment was called the Emergency Price Control Act of 1942, but “the case was tried entirely upon the theory of the amendment to the Act rather than the Act as it was afterward terminated.” (Resp. Br. p. 31.)

In *DeJonge v. Oregon*, 299 U. S. 353, at 362, 81 L. Ed. 278, the Court held that a conviction upon a criminal

charge when made is a denial of due process of law. At page 362 the Supreme Court says:

“Conviction upon a charge not made would be a sheer denial of due process.”

The Court points out that the charge cannot be extended beyond the limitations in the indictment.

In *Viereck v. U. S.*, 318 U. S. 236, 87 L. Ed. 734, the Supreme Court held that the unambiguous words of a statute which impose criminal penalties are not to be altered by judicial construction, nor to be altered by reference to rules or regulations issued pursuant to a statute; nor can the words of an indictment be altered to add the words “as amended” to a statutory reference in an indictment when those words are not there. (*Ex parte Bain*, 121 U. S. 1.)

By the Government’s own admission, therefore, the defendants were tried on a charge not made and the indictment was void and in violation of due process. (*DeJonge v. Oregon*, 299 U. S. 353.)

Respondent asserts that judicial notice should be taken of the amendments without the necessity of express allegations. (Resp. Br. p. 31.) This has never been the law with reference to indictments.

Sixth Amendment, U. S. Constitution;

Carney v. U. S., 163 F. 2d 784;

Samuels v. U. S., 169 F. 2d 789;

Ex parte Bain, 121 U. S. 1;

Sutton v. U. S., 157 F. 2d 661;

Cruickshank v. U. S., 92 U. S. 542;

Skelley v. U. S., 37 F. 2d 503;

Partson v. U. S., 20 F. 2d 127;

Grimsley v. U. S., 50 F. 2d 509, 511-12;

Shulten v. U. S., 257 Fed. 724;

Moore v. U. S., 160 U. S. 268.

The provisions of the Sixth Amendment to the Constitution of the United States require that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This does not permit some other accusation "as amended." Where the offense is statutory, it must be so definite and certain as to inform the defendant of the exact statute. Where the indictment fails to set forth every ingredient of the offense as to which the defendant is to be tried, it fails to comply with the Sixth Amendment. (*Sutton v. U. S.*, 157 F. 2d 661, 663.)

One cannot be charged with one crime and tried on another, as the Government's brief seems to suppose in its assertion that the case could be tried on the theory of an amended statute, though it was not charged in the indictment. To withhold essential facts in the indictment that are required to describe the accusation with accuracy and certainty is to deny full information of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution of the United States.

Sutton v. U. S., 157 F. 2d 661;

U. S. v. Cruickshank, 92 U. S. 542, 557.

As said in *U. S. v. Ferranti*, 59 Fed. Supp. 1003, the indictment must set out the nature and cause of the accusation and no element of the crime charged must be left to conjecture or surmise. In that case the Court sustained

motions to quash counts 1 to 18 of the indictment, where Maximum Price Regulation 269 had been revised twice after the return of the indictment. The Court sets out in full the requirements that an indictment set out the exact charge which the accused must face and under the exact regulation, which becomes important to the defendant in determining under which amendment he is to be tried in respect to each of said counts in the indictment.

“Without that knowledge it would be difficult for him to prepare his defense. It may be too late for him to produce witnesses to answer the Government’s charges if he learns the essential details thereof only after he has been put on trial.”

The Court quotes from *U. S. v. Potter*, 56 Fed. 83:

“In order to properly inform the accused of the ‘nature and cause of the accusation,’ within the meaning of the constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated, minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details.” (And we may add here, as to the exact statute and the exact regulation.)

A defendant should not be required to guess at what he is charged with, namely, that although the prosecutor charged him with a violation of a statute which has expired, he has to assume that he is charged with an amended statute not alleged, and then permit the prosecutor to rely on a Circuit Court of Appeals to relieve him of his carelessness and lack of specificity in such a solemn declara-

tion as an indictment. Where the error is exposed on appeal, the prosecuting attorney seeks to have the Appellate Court justify the unconstitutional proceeding, but the liberty of a citizen cannot be risked on so slim a basis. See cases cited in *United States v. Ferranti*, 59 Fed. Supp. at page 1004; also *United States v. Potter*, 56 Fed. 83, 89.

In *United States v. Interstate Properties*, 153 F. 2d 469, at 471, the District Court of Columbia also sustained demurrers to an indictment for vagueness and uncertainty of the indictment, concerning statutory or regulatory requirements, and in *United States v. Crummer*, 151 F. 2d 958, 962, the Court also reviewed the need for an indictment to allege the nature and cause of the accusation with clarity and certainty and must descend to particulars and charge every constituent ingredient of the crime, which means the specific statute relied on where the charge is based upon a statutory offense.

In *United States v. Durst*, 59 Fed. Supp. 891, the Court sustained demurrers to an information charging a violation of War Food Distribution orders, where the statutes or regulations supposedly relied on were indefinite and uncertain.

If so, this Court could have taken judicial notice in *Carney v. U. S.*, 163 F. 2d 784, that there were no K-14 ration coupons. Congress itself in amending the Act in the amending statute cited that what it was amending was the Emergency Price Control Act *as amended*. We set out here the Act of Congress in full, setting out the language of Congress with reference to the amendments. Sections 17, 18 of Act of July 25, 1946, c. 671, 60 Stat. 678, provides:

“Sec. 17. This Act may be cited as the ‘Price Control Extension Act of 1946.’

“Sec. 18. (1) The provisions of this Act shall take effect as of June 30, 1946 and (2) all regulations, orders, price schedules, and requirements under the Emergency Price Control Act of 1942, *as amended* (except regulations or requirements under sec. 2(e) thereof relating to *meat*, flour or coffee) and the Stabilization Act of 1942, as amended, which were in effect on June 30, 1946, shall be in effect in the same manner and to the same extent as if this Act had been enacted on June 30, 1946 and (3) any proceeding, petition, application, or protest which was pending under the Emergency Price Control Act of 1942, *as amended*, on June 30, 1946, shall be proceeded with and shall be effective in the same manner and to the same extent as if this Act had been enacted on June 30, 1946: Provided, That in any case in which the Emergency Price Control Act of 1942, *as amended* (except sections 204 and 205), or the Stabilization Act of 1942, *as amended* (except sections 8 and 9), or any regulation, order, or requirements under either of such Acts, prescribes any period of time within which any act is required or permitted to be done, and such period had commenced, but had not expired on June 30, 1946, such period is hereby extended for a number of days equal to the number of days from July 1, 1946, to the date of enactment of this Act, both inclusive: Provided further, That any act or transaction, or omission or failure to act, occurring subsequent to June 30, 1946, and prior to the date of enactment of this Act, shall be deemed to be a violation of the Emergency Price Control Act, shall be deemed to be a violation of the Emergency Act of 1942, *as amended*, or the Stabilization Act 1942, *as amended*, or of any regulation, order, price schedule, or requirement under either of such acts: Provided further, That insofar as the pro-

visions of this Act require the Administrator to make any change in any maximum price, such provisions shall not be deemed to require such change to be made before the thirtieth day following the date of enactment of this Act."

It will be noted first of all that Congress referred in the Price Control Extension Act of 1946 to the Emergency Price Control Act of 1942, *as amended*. This was an entirely new Act in 1944. It did not refer to the Emergency Price Control Act. It is, therefore, apparent that the title to the law as it previously existed was the Emergency Price Control Act *as amended*, not merely the Act.

It is also to be noted from the above that the Price Control Extension Act of 1942 excepted from the extension any requirements relating to *meat* and that, therefore, all laws and regulations relating to meat and meat prices in fact had expired on June 30, 1946, prior to the time of the trial of this case, and were not extended by the new law. Neither any law nor any regulations were applicable after June 30, 1946.

Respondent's brief calls attention to the fact that the REVISED Maximum Price Regulations were passed in 1945 (10 F. R. 9878, August 8, 1945, 10 F. R. 11801, Sept. 13, 1945, and 10 F. R. 13113, Oct. 9, 1945). These were clearly never passed pursuant to the Emergency Price Control Act of 1942. The authority and procedure was all in subsequent amended Acts. In 1944 Congress completely adopted a new Emergency Price Control Act, *as amended*. Counsel, therefore, is mistaken as to his reference to the title of the Act thereafter as referred to by Congress itself, which construed the words "*as amended*"

as essential to its reference to the Act, which it was thereafter extending by the subsequent price control Acts.

As a matter of fact, the Emergency Price Control Act of 1942 ceased to be called by that title in 1944. In 1944 a new Act was passed, called the Stabilization Act of 1944 (Ch. 325, Title I, Sec. 101, 58 Stats. 632), amended June 30, 1945 (Ch. 214, Sec. 1, 59 Stats. 306).

Issues of slaughtering came under the Stabilization Act, first passed in 1942 (Ch. 578, 56 Stat. 765.)

That act appointed an Office of Economic Stabilizer and completely rewrote price control, making stabilization of prices, wages and salaries all a part of the Act, requiring that particularly relating to slaughter of animals and the requirements thereunder. (Act of Oct. 2, 1942, Ch. 578, 56 Stats. 765.) The provisions of that Act were to terminate June 30, 1944 or at such earlier date as the Congress by concurrent resolution may prescribe. (56 Stats. 767) as amended June 30, 1944 (Ch. 203, 58 Stats. 648).

As a matter of fact, the alleged violations of the appellants related to the fixing of prices resulting from the processing of agricultural commodities, including livestock, as defined in the Stabilization Act, where Congress said *a generally fair and equitable margin* shall be allowed for such processing. (56 Stats. 765.) The Act expired June 30, 1946 and during the pendency of this indictment. A new Act was passed. The new Act was called Extension of Price Control Act of 1946, which was passed on July 25, 1946.

The appellants also asked for a Bill of Particulars to specify what statutes and what regulations, and what

prices they were alleged to have charged in violation of such statute or regulation. [R. 28 *et seq.*]

The Motion for Bill of Particulars was resisted by the Government and denied by the court. [R. 32.]

There is another reason why the indictment in this case is void. It should have been presented with a little more certainty than was presented, and that is, that the indictment alleges violations of the "*Emergency Price Control Act of 1942*" [R. p. 2]. Thereafter, throughout the indictment, it is alleged only that there was a violation of the "*Emergency Price Control Act of 1942.*" The words "as amended" nowhere appear in the indictment. That statute had, therefore, expired in 1943 and the power of the Grand Jury sitting in 1946 to indict for an act which had expired and under which no regulations had then been issued was a nullity.

I-C.

Jury Instructions on an Erroneous Law Reversible Error Under *Samuels v. U. S. Case*.

The Court in the instructions to the jury attempted to amend the indictment in effect by instructing the jury: "I now instruct you that under the Emergency Price Control Act of 1942, '*as amended,*'" *etc.* [R. p. 362]. This was erroneous, as it attempted to add by instructions what did not exist in the indictment, namely, the words "as amended." The indictment did not so charge. The Court was powerless to add words to the indictment in the charge to the jury.

The indictment charges that the defendants charged prices "in excess of the maximum prices permitted under the Emergency Price Control Act of 1942 and applicable regulations promulgated thereunder, including revised

Maximum Price Regulation 165,” and throughout it charged a violation of the Price Control Act of 1942 and Maximum Price Regulations 148, 165, 169 and 239. However, none of these regulations were issued under the Maximum Price Regulations of 1942 and the Maximum Price Regulations stated in the indictment thereunder, since the Emergency Price Control Act of 1942 by its very terms expired in 1943 and the regulations under which it was claimed there was a violation were not promulgated until a date after the expiration of the Act.

It is true that the Act was amended, but the indictment does not charge the violation of the Act *as amended*, nor that the regulations were issued pursuant to the provisions of the Act, but throughout the indictment charges the violation of the Act and the regulations as promulgated pursuant to the provisions of said Act—not to any amendment of said Act. Insofar as the indictment is concerned, the violations occurred under the original Act, and none of the regulations here offered or the prices set out were promulgated under the original Act. The motion to dismiss, therefore, should have been granted.

The expiration of the Act itself terminated the power to promulgate regulations under the Act, and none of the regulations were promulgated under the Act but under the *Amended Act*, which was not what the indictment alleged. These regulations under the Amended Act were revised many times. But the indictment does not allege “revised” regulations. An indictment like a regulation must be specific. *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 621 (see quote below).

Furthermore, not only did the indictment allege the violation under the Act (without the Amendment) but in the interim the statute and all of the amendments had ex-

pired. See *U. S. v. Chambers*, 291 U. S. 217; *Hark v. U. S.*, 320 U. S. 290.

The Court attempted throughout its instructions to tell the jury: "All of the remaining 22 counts have been brought under the Emergency Price Control Act of 1942, *as amended*, Title 50, U. S. C. App. S. 901, etc., and regulations issued under that statute" [R. p. 363]. Again the Court instructed the jury: "Under the Emergency Price Control Act of 1942, *as amended*, a person is prohibited from wilfully making * * *" [R. p. 364].

The Court further incorrectly told the jury that:

"The prices which I have read to you as the highest lawful price in effect on certain days for the several meat items, to which I have referred, were fixed in accordance with the Emergency Price Control Act of 1942, * * *" [R. p. 364].

However, the prices were not fixed by the Emergency Price Control Act of 1942, but by the Act *as amended*, and by revised regulations issued pursuant to the amended Act—not according to the Act.

The Court again told the jury:

"Maximum Price Regulation No. 169 is a price regulation issued pursuant to the Emergency Price Control Act of 1942" [R. p. 367].

But the regulation was only issued pursuant to the Emergency Price Control Act of 1942, *as amended*.

The Court quoted from Revised Maximum Price Regulation 169 on "Evasions," which in part says:

"Every person making a sale * * * shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency

Price Control Act of 1942, as amended, remains in effect, * * *” [R. p. 368].

This could not be done.

Samuels v. U. S., 169 F. 2d 789.

Therefore, the Court was without jurisdiction in the matter in view of the fact that the Government was proceeding in an indictment under the original Price Control Act when it was first established and under original regulations.

The indictment itself charges that the conspiracy charged therein commenced on or about July 1, 1943. This was subsequent to the expiration of the statute itself.

The test of whether a statute is violated depends upon the allegations of fact in the indictment. If reference to a statute is essential for the reason that the indictment does not make sense or is lacking in necessary allegations without it, an incorrect reference may be fatal.

Martin v. U. S., 99 F. 2d 236, 238.

Here the indictment charged a violation of an emergency price law and reference to the statute only made sense if the facts alleged could or did exist under the emergency statute. It did not make sense because the indictment setting out the facts alleged as a fact that the defendants violated a statute that was then nonexistent and violated regulations that were then nonexistent. The defendants had a right to look to the facts set out in the indictment.

This is not a case of a violation of a law which can be determined from the facts without reference to a specific statute and a specific regulation issued pursuant to that then existing statute, and cannot be supplemented by Court

instructions or otherwise corrected in the body of the indictment, because the very language used fails to make sense.

Not only had the statute expired but the regulation under the new amended statute had been *revised* many times. The indictment did not specify "revised" maximum price regulation nor which revision, nor was the defect supplied by a requested bill of particulars.

The offense here charged was based upon an emergency statute which existed only for a year. The facts set out in the indictment do not actually charge an offense, because the pleader only charged a violation of the statute and without showing that there was any violation of any other statute. The sufficiency of the indictment must be determined by the facts therein set forth. For the pleader to insert his conclusion that such facts are in violation of a statute is merely a conclusion, and if that statute is already nonexistent it is a fact upon which the defendant may rely and he does not have to look to some amended statute or to some supplemental regulation.

In *United States v. Harris*, 177 U. S. 305, 44 L. Ed. 780, the Supreme Court of the United States held that railroad receivers are not liable to an action for penalties for failure to comply with regulations as to transportation of live stock, and since receivers are plainly not within the letter of the statute and not within its purpose, and as the statute is penal, it cannot be construed to extend to them. The Court said:

"The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not suggest."

This is not a case where the facts are set up without the aid of the reference to the statute and without the aid of necessary regulations issued pursuant to that statute. It is an attempt to extend the indictment to a non-existent statute and nonexistent regulations, and this cannot be done.

This is not a case of an indictment under a wrong statute, but an indictment under a nonexistent statute and nonexistent regulations and it must, therefore, be held fatally defective.

In *M. Kraus & Bros. v. U. S.*, 327 U. S. 614, 621, 90 L. Ed. 899, the Supreme Court said:

“But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. *A prosecutor in framing an indictment* (emphasis ours), a court in interpreting the Administrator’s regulations or a jury in judging guilt, cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator’s interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language.”

The failure of the prosecutor to set forth adequately in his indictment the exact charge and statute on which the government admits the case was later tried and the exact specification of revised regulations is fatal to the prosecution and cannot be supplied by conjecture.

II.

A Single Conspiracy Was Charged as Multiple Conspiracies in Conflict With the Case of Braverman v. U. S., 317 U. S. 49.

In connection with our first point that the indictment in this case alleges in the first count a felony conspiracy in violation of Title 18, Sec. 88 U. S. C., we wish to call the attention of the Court to the fact that the items alleged in the conspiracy count are also the items alleged in the substantive counts.

In *Sealfon v. U. S.*, 92 L. Ed. 215, 68 S. Ct. 237, the Supreme Court held that *res adjudicata* has application in a case where a defendant is charged with a substantive offense and conspiracy to commit it. These are separate and distinct offenses and one may be prosecuted for both crimes, but *res adjudicata* may be a defense and operates to conclude those matters in issue which the verdict determined, though the offenses be different. See *United States v. Adams*, 281 U. S. 202, 205.

Where the jury returned its verdict finding the defendants guilty of conspiracy, based upon transactions which the Government sought to establish as the basis of the substantive offenses, the finding of conspiracy necessarily precluded a conviction of the other counts, for each of the other counts charged a conspiracy between the defendants Charles M. King, Southern California Meat Company, and others, though charged as substantive offenses, was actually the same or similar conspiracy to that charged

in count 1 and, therefore, under the *Sealfon* case all of the other counts must fall.

Collateral with the consideration of the case of *Sealfon v. United States*, raised by us, is also the question of whether under the case of *Braverman v. United States*, 317 U. S. 49, the entire indictment does not charge but a single conspiracy, of which each of the separate transactions charged therein are but overt acts rather than a general conspiracy in a series of individual acts. The prosecutor has attempted to carve out of the same transaction a general conspiracy and a series of smaller conspiracies within the general conspiracy, and has thus made numerous counts out of what under the *Braverman v. United States* case is but a single count in any event. He made a count literally out of each leg, each bone and each breast, and each prime rib. Each of the subsequent transactions from count two on, charges an agreement to sell certain meat, etc. [R. p. 6 *et seq.*]. This is but a part of the claimed conspiracy alleged in Count One, "That the defendants would sell and cause others to sell at prices in excess of the maximum prices permitted under the Emergency Price Control Act of 1942, and applicable regulations promulgated thereunder, including Revised Maximum Price Regulations Nos. 148, 169 and 239.

III.

Compulsory Returns Not Admissible. Statutory Requirement Not Complied With.

The Government in response to our contention as to the illegal admission of the evidence of the tax returns cites *Shubin v. U. S.*, 164 F. 2d 377 (decided by this Court). However, that case is distinguishable. In that case the returns and the writings were excluded. Also in that case no contention was made that the compulsory nature of the statute under the tax law made the use of the statements inadmissible. Also no contention was made that the Commissioner of Internal Revenue had no authority under the statute to make public the tax returns and that only the Secretary of the Treasury had that power. As a matter of fact we have since this case checked the applications for making public the returns, and in only a single instance has that been done since the passage of the statute (Title 26, Sec. 55).

This case differs from the *Shubin* case cited by the respondent, in that in the *Shubin* case the Court excluded the tax statements of the defendant, whereas here the Court admitted the statements. In the *Shubin* case no challenge was made to the statute or to the regulations. Here there was a challenge to the statute and the regulations under the Fourth and Fifth Amendments to the Constitution of the United States.

The respondent relies upon the declaration in the statement that it was free and voluntary, but the circumstances of the giving of the statement contradict its free and voluntary character, which was given under the compulsion

of a statute and given in fear of possible prosecution and in hope of immunity from that prosecution.

Internal Revenue Agent v. Sullivan, 287 Fed. 138;

Arnstein v. McCarthy, 254 U. S. 71, 65 L. Ed. 138.

Even in the case of a plea of guilty, where it is claimed that it was not free and voluntary, and understandingly entered the circumstances may deny the written declaration of its free and voluntary character or the actual plea of guilty in court. The Supreme Court has held that one has the right to submit that issue to the jury.

Von Moltke v. Gillis, 92 L. Ed. 286, 292, 298;

Rice v. Olson, 324 U. S. 786;

Anderson v. U. S., 318 U. S. 350, 356;

And see:

Upshaw v. U. S., 93 L. Ed. (Adv. Sheets), 129,
decided Dec. 13, 1938.

Furthermore, there is no showing that Congress intended that the Commissioner could by regulation authorize the use in a trial of income tax statements or statements made to Internal Revenue agents. The regulations permit inspection. The statute, sec. 55, only permits income tax returns to be "open to *inspection* only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President" (Title 26, sec. 55). Furthermore they "shall be open to inspection to such extent as shall be authorized in rules and regulations promulgated by the President." There is nothing in the statute that authorized the use in evidence. The word "inspection" was never intended to authorize a use such as was here made; nor was there ever any order

of the President in this case, nor any rules or regulations promulgated by the President.

Two things are necessary under the statute: (1) an order of the *President*, and (2) acts under the rules and regulations promulgated by the Secretary. Neither was done here. We think the order referred to here means a specific order in a specific case or in circumstance. Not a general order. We have examined the Federal Register to find if there was ever any authority by the President granting any proceedings or any authority, or any rules or regulations promulgated by the President pursuant to this section, and we have been unable to find any. Furthermore, it is our recollection that when Congress sought an inspection of certain returns in war contractor cases involving Congressman May, a specific grant of authority was made by the President. If Congress could not itself inspect returns without this specific authority, we respectfully submit that no authority was granted to an Assistant United States Attorney, or to a District Court, to use these returns or any statements made in this department in the manner herein made.

Treasury Decisions 4945 *et seq.* do not appear to be authorized by the President.

Respondent relies on *Shubin v. U. S.*, 164 F. 2d 377, to justify the legal attack challenged in our brief. In the *Shubin* case no challenge was made to the statute and the proceedings as in violation of the Fourth and Fifth Amendments. In the *Shubin* case likewise this Court said:

“No documents were introduced in evidence. Agents testified as to conversations and statements made by them in the course of their investigations.”

This is contrary to the procedure here, where the Government introduced documents in evidence, and, not like

the *Shubin* case, introduced the individual income tax amended returns of the appellants. No specific authority was ever received pursuant to any regulation to use the income tax returns. They were used contrary to the provisions of Title 26, sec. 55, which is different than what happened in the *Shubin* case. The Government argues that the statements made and the returns were in the nature of admissions rather than confessions, but if either admissions or confessions the use of these statements was highly prejudicial.

Respondent says:

“The record clearly shows that the admissions or statements made by both Stillman and Segal were voluntary and were without any element of compulsion.”

Respondent is in error. The statute supplies the compulsion. It provides penalties for failure to make the statements and if the appellant had not made statements pursuant to the statutory requirements he would have been subject to imprisonment and fine. We know of no greater element of compulsion than this. But, like other statutes which compel disclosure, the statute itself must be as broad as the constitutional guarantee of the Fifth Amendment, or the statement is in truth and in fact not voluntary.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110, 1113;

Brozen v. Walker, 161 U. S. 591, 40 L. Ed. 816;

United States v. Monia, 317 U. S. 424, 87 L. Ed. 376.

As Justice Frankfurter said in *United States v. Monia*, Congress may choose when to grant immunity and not to grant it.

It is implicit in the decision of *Feldman v. U. S.*, 322 U. S. 487, 88 L. Ed. 1408, that had the statute been a federal statute compelling disclosure, the disclosure could not be used in evidence without infringing on the Fifth Amendment to the Constitution of the United States. Here the statute did compel disclosure and was in fact compulsory. It was for this reason that we therefore tendered defendants' proposed instructions 26, 20 and 28, which were not given. The jury had a right to determine in truth and in fact whether the defendants were acting under statutory compulsion even though the statements themselves were labeled free and voluntary.

In connection with our point that the use of the statements and the income tax return was compelled testimony within the meaning of the *Feldman* case, the respondent has apparently missed our point.

It is our contention that Title 26, Section 54, of the Internal Revenue Code requires every person liable to attack to keep such records, render under oath such statements, make such returns and comply with such rules and regulations as the Commissioner, by approval of the Secretary, may from time to time prescribe.

It also provides that unless one makes such a return, under such proceedings, he is guilty of a crime, for which he is liable to imprisonment. Therefore, the Statute provides and compels the making of the statement, and having made those compulsory statements may they thereafter be used by another agency of the Government to incriminate and prosecute the person making them, without infringing upon the Fifth Amendment to the Constitution of the United States against self-incrimination.

See:

Internal Revenue Agent v. Sullivan, 287 Fed. 138;
Harris v. U. S., 221 U. S. 274.

We respectfully submit that they may not. We submit that where one is compelled to make the statement by law, that that statement is thereafter not a free and voluntary statement and may not thereafter be used as a free and voluntary statement without infringing the constitutional right guaranteed by the Fifth Amendment to the Constitution of the United States against self-incrimination and also against due process of law. It is compulsory discovery such as condemned in *Boyd v. U. S.*, 116 U. S. 616, and in *Feldman v. U. S.*, *supra*.

A confession is not made voluntarily nor is the necessity for instructions regarding its voluntary character eliminated by reason of the declaration by a Government Officer at the beginning of the statement that it was free and voluntary.

Even if the statements contained the heading that they were free and voluntary, this did not make them so and the defendants had the right to have the jury determine whether they were in fact free and voluntary. Since they were made under the compulsion of the law that did not make them free and voluntary, if they were subject to a penalty for not making the statements.

The authority to give out information or to inspect income tax returns is granted (1) "only upon order of the

President” *and* (2) “under the rules and regulations prescribed by the Secretary and approved by the President.” (Numbers ours.) In other words, the publicity may not be given to any record in the Internal Revenue Bureau except upon order of the President and under other provisions additionally. In this case, it is conceded that there was never any order of the President. The Statute does not give any authority to prescribe by rules and regulation the inspection, or use in evidence, of income tax returns. If it did, it would be unconstitutional to the extent that it would be non-compliant with the provisions of Section 55 of Title 26, that only inspection is permitted and only upon order of the President and under rules and regulations prescribed by the Secretary. The Statute does not permit use in evidence.

Even under sub-section (d) of Title 26, the information that is to be secured by inspection of the Committees of Congress, subsection (d) of Section 55, Title 26, you only proceed by a resolution of the Senate or House, or a joint committee so authorized, and such information shall only be furnished to such committee “sitting in executive session.”

Congress nowhere authorized the use of such proceedings in any court.

IV.

The Invoices and Records on Which the Government's Case Is Based, Were Improperly Admitted in Evidence. There Was No Foundation for Their Admission. This Requires Reversal of the Judgments.

The Government did not answer our objection that the invoices, books and records were admitted in evidence over the objections that no proper foundation was laid for them. That in order to be admissible there had to be compliance by laying a foundation in accordance with Section 695 of Title 28, which provides that:

“If it shall appear that it was made in the regular course of any business and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, within the reasonable time thereafter.” [R. 304, 305.]

The court considered this objection and overruled it, and admitted the invoices and testimony from the books in evidence, without laying the foundation

- (1) that the invoices and records were made in the regular course of business;
- (2) that it was the regular course of business to make such invoices and records at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

The motion to strike these invoices and information from the books was again denied. They denied the Motion to Strike Mr. Namson's testimony [R. 322] which was taken from books and records for which there was a foundation lacking.

V.

The Evidence Was Insufficient to Justify the Verdict.

Respondent inferentially concedes that there is no proof of any unlawful agreement to sell above ceiling prices. Counsel says that such an unlawful agreement may be had by circumstantial evidence, but has not pointed out any circumstantial evidence which shows any such unlawful agreement. The evidence here is as consistent with innocence as with guilt as to the existence of any such unlawful agreement. Under such circumstances such unlawful agreement is not shown by the evidence. The acts of Segal are not shown to have been known to or to have been agreed to or arranged by or in any way participated in by Stillman. The making of one sale by Stillman unknown to Segal, without any evidence to show that Segal knew anything about it, did not make him engage in a common enterprise with Segal.

An examination of the various counts, after count one, shows a lack of any substantial evidence to show that Stillman participated in the acts. Respondent apparently realizes the weakness of their position on the several counts and urges that the substantive charges might be sustained upon the theory of aiding and abetting (Brief p. 44). But there is no more proof of aiding and abetting than there is of conspiracy. Such proof must be of affirmative acts shown in evidence. (*Falcone v. U. S.*, 109 F. 2d 579, 581.) Under the doctrine of *Falcone v. U. S.* even if a seller knew that a buyer was to use goods to commit a crime it would not make the seller a conspirator or aider and abettor, of the buyer. How then does a mere business partner become a conspirator or aider and abettor in the various counts here charged?

VI.

Faulty Instructions.

As to the instructions, counsel for respondent says that he does not see how the appellants can complain of the formula instruction. He says that appellants stipulated that Edward F. Cunningham would testify as to each invoice that the prices shown therein were the maximum ceiling prices for such meats on those particular dates. Respondent has missed part of the points of our complaint. We complain of the instruction because it is given under a statute not charged in the indictment, but under a statute "as amended" and it is given under price regulations that were nonexistent at the time of the statute in question. What we complain about is that the instruction attempted to amend the indictment by adding the words "as amended" and the jury were told that they could bring in a verdict under a law as amended, under which the defendants were not charged. This is a sheer violation of due process of law. (*DeJonge v. Oregon*, 299 U. S. 353, 81 L. Ed. 278.) A formula instruction was condemned by this Court. Unfortunately, the court reporter taking down the objections to the instruction did not transcribe the same and at the time of the preparation of the record had gone to Honolulu. However, the record as it stands shows that the court acted beyond and in excess of its jurisdiction in charging the jury contrary to the indictment.

Also, we believe that the Court erred in telling the jury that Maximum Price Regulations 169, 148 and 239 were applicable. These regulations were *revised* many times, but the acts charged were in 1945, subsequent to the new Emergency Price Control Act of 1942, as amended, and

revised maximum price regulations under the amended statute. The charge therefore was patently erroneous.

It will be noted in the Appendix to Respondent's Brief that reference is made to *Revised Maximum Price Regulations* even as early as December 16, 1942. These and other regulations were revised many times, under amended statutes not alleged in the indictment.

In addition to the other errors of instructions, however, the instruction given by the court falls under the ban of the court's decision in *Saul Samuel, et al. v. United States*, 169 F. 2d 789, where this court said:

"In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. *Kreiner v. United States*, 2 Cir., 11 F. 2d 722; *Kinard v. United States*, 68 App. D. C. 250, 96 F. 2d 522; *Morris v. United States*, 9 Cir., 156 F. 2d 525; *United States v. Levy*, 3 Cir., 153 F. 2d 995; *Corson v. United States*, 9 Cir., 147 F. 2d 437; *Miller v. United States*, 10 Cir., 120 F. 2d 968; *Screws v. United States*, 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330; *United States v. Noble*, 3 Cir., 155 F. 2d 315; *United States v. Pincourt*, 3 Cir., 159 F. 2d 917; see 169 A. L. R. 305-355 on the subject generally. *We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all.*" (Emphasis added.)

We think the language of this court in *Samuel v. United States* squarely covers the case here and requires reversal. Furthermore, this court said, in *Samuel v. United States*, in the learned opinion by Judge Stephens:

"It is seen that the formula given by the court had no relation to the law as it existed during the

period of the alleged conspiracy, and that it is not possible for us to make any comparison as to the effect on the maximum price between the true applicable law and the erroneous law actually applied by the jury. We are not at liberty to assume that the instruction as given was favorable to appellants and, therefore, non prejudicial."

We think much of the language is highly in point in this case. The court, in the *Samuels* case, said:

"The government also contends that since the court correctly instructed the jury that *there was a ceiling price* and that the case was tried upon that basis, the part of the instruction referring to a markup of 15% is surplusage. We have seen that the premise for this argument is not strictly as the government puts it; but, even so, this contention cannot be sustained."

Conclusion.

The indictment was a nullity, on its face it failed to show jurisdiction in the grand jury which returned it.

The indictment failed to charge an offense under an existing statute or regulations.

The case was tried on a charge and statute not alleged in the indictment. Records, secured by *statutory compulsion*, were permitted to be introduced in evidence.

There was no request or order of the President for these records.

The word "inspection" in the statute, Title 26, Section 55, has been expanded to beyond its permissive statutory use by regulations. The statute does not permit such regulations, which, if applicable, would nullify the need

for a specific request by the President. This may not be done.

Viereck v. U. S., 318 U. S. 236;

U. S. v. Eaton, 144 U. S. 677, 36 L. Ed. 591;

U. S. v. Standard Brewery, 251 U. S. 210, 64 L. Ed. 229;

U. S. v. 11,150 Pounds of Butter, 195 Fed. 657;

U. S. v. Grimand, 220 U. S. 506, 55 L. Ed. 563;

Re Kollock, 165 U. S. 526, 41 L. Ed. 813.

The tax returns were therefore illegally received in evidence.

Invoices and records were admitted without proper foundation as required by statute.

The instructions were faulty and not within the indictment.

Respondent has failed to meet our objections to the inadmissibility of the invoices and the inadmissibility and use of the books and records of the Southern California Meat Company to which objection was made that it was without proper foundation.

We believe that the other matters have been covered in our other brief.

Wherefore, appellants pray for reversal of the judgments.

MORRIS LAVINE,

Attorney for Appellants.

No. 11382

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER
SHUBIN and JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME I

(Pages 1 to 292, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC - 4 1946

PAUL P. O'BRIEN

No. 11382

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No. 18,367

Filed: Mar. 11, 1946

Bond:

Viol.: United States Code, Title 18, Section 88.

United States Code, Title 50, App., Section 901
et seq.Conspiracy to commit offenses against the United
States.Violations of the Emergency Price Control Act
of 1942.In the District Court of the United States in and for the
Southern District of California
Central Division

INDICTMENT

In the District Court of the Southern District of Cali-
fornia, ss.:

The Grand Jurors of the United States of America, being duly impaneled, sworn and charged in the District Court for the Southern District of California, Central Division, in the September 1945 Term of said Court, having begun but not finished during the said September Term of Court, among other things, the matter of the investigations charged in this indictment, and having continued to sit by the order of this Court in and for the said District during the February 1946 Term to complete inquiries begun but not finished at the original

term, and inquiring for that District, upon their oaths find and present as follows:

COUNT I

1. That

WILLIAM SHUBIN,
FREDERICK ALEXANDER SHUBIN, and
JACK L. KISSEL,

whose names are to the Grand Jurors otherwise unknown, who are hereby indicted, and are hereinafter called the defendants, at all times material herein engaged in the sale of meat as wholesaler and/or hotel supply house of meat, under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239, under the firm name and style of Vernon Hotel and Restaurant Supply Company. [2]

2. That the said defendants, since on or about November 1, 1942, and continuously thereafter to and including the finding and presenting of this indictment, in the County of Los Angeles, State of California, and within the Division and District aforesaid and in other places to the Grand Jurors unknown, did feloniously and unlawfully conspire, combine and confederate together, and with divers other persons whose names are to the Grand Jurors unknown, to commit offenses against the United States of America, to wit:

a. That the said defendants would refuse and cause others to refuse to sell meat to any prospective purchaser unless the price paid therefor was in ex-

cess of the maximum prices permitted under the Emergency Price Control Act of 1942, and of the Maximum Price Regulations Nos. 148, 169 and 239 thereunder;

b. That the said defendants would sell and cause others to sell meat at prices in excess of the maximum prices permitted under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239.

c. That the said defendants would make and cause others to make false, fictitious and fraudulent entries upon the records kept by and for the said defendants in the conduct of their aforesaid business, in connection with the purchases and sales of meats, in violation of the aforesaid Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

d. That the said defendants would make and cause others to make fictitious payments, loans, transfers, collections and receipts of money to and from other persons and firms for the purpose of concealing, and would otherwise conceal, the aforesaid illegal charges, false, fictitious and fraudulent entries and receipts of money for meat in excess of the maximum prices permitted under the aforesaid Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

e. That the said defendants would issue and would cause others to issue various checks, notes and other evidences of payments, loans, [3] collections, transfers and receipts which did not in truth and in fact represent the true and actual transactions between

the parties, but which were fictitious and fraudulently made, received, transferred and entered on the books and records of the aforesaid defendants for the purpose of concealing their other aforementioned illegal activities in violation of the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

f. That the said defendants would cause and would persuade others to cause divers persons to make false, untrue and fraudulent entries upon the records of the said divers persons for the purpose of concealing the aforesaid illegal activities of the said defendants;

g. That the said defendants would engage and would cause others to engage in various similar and dissimilar schemes, tricks, falsifications and methods of their aforesaid illegal activities as might occur to them and others from time to time, in order to commit and to conceal the commission of violations of the aforesaid Emergency Price Control Act of 1942 and the Maximum Price Regulations Nos. 148, 169 and 239;

h. That each of the said defendants would share equally with the other defendants in all gains and profits flowing and accruing from any and all of the above-described illegal activities.

3. That in furtherance of, and to effect the purposes and objects of said conspiracy, the said defendants, at the times and places hereinafter set forth, within the

jurisdiction of this Court, committed the following overt acts:

a. On or about November 16, 1942, the defendants entered into a partnership agreement.

b. On or about December 31, 1943, the defendants made or caused to be made an entry on the general ledger of the Vernon Hotel and Restaurant Supply Company, account 301, showing total sales of meat by them during 1943 of \$747,394.28.

c. On or about March 31, 1943, the defendants made or [4] caused to be made an entry in the general ledger of the Vernon Hotel and Restaurant Supply Company, account 264, of the receipt in that account of \$25,273.50;

d. On or about June 30, 1943, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$2,860.55.

e. On or about October 31, 1943, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$15,477.79.

f. On or about November 30, 1943, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$11,713.30.

g. On or about April 30, 1944, the defendants made or caused to be made an entry upon the records

of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$17,999.56.

h. On or about August 31, 1944, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$19,490.27.

i. On or about February 24, 1945, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$57,943.80.

j. On or about April 28, 1945, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$103,030.75. [5]

k. On or about April 17, 1945, the defendants issued check No. 6962 of the Vernon Hotel & Restaurant Supply Co., payable to Wm. A. Shubin;

l. On or about July 25, 1945, the defendants issued check No. 7298 of the Vernon Hotel & Restaurant Supply Co., payable to William Shedd;

m. On or about August 17, 1945, the defendants issued check No. 7382 of the Vernon Hotel & Restaurant Supply Co., payable to Sidney Blau;

n. On or about August 21, 1945, the defendants issued check No. 7396 of the Vernon Hotel & Restaurant Supply Co., payable to the A. M. Provision Co.;

o. On or about September 27, 1945, the defendants issued check No. 7540 of the Vernon Hotel & Restaurant Supply Co., payable to Rudolph Hauswald;

p. On or about August 27, 1945, the defendants issued check No. 7535 of the Vernon Hotel & Restaurant Supply Co., payable to J. Joe Vega;

q. On or about the 19th day of July, 1944, the defendants issued or caused to be issued Invoice No. 41736 of the Vernon Hotel & Restaurant Supply Co.;

r. On or about October 31, 1944, the defendants issued or caused to be issued Invoice No. 44235 of the Vernon Hotel & Restaurant Supply Co.;

s. On or about December 4, 1944, the defendants issued or caused to be issued Invoice No. 45128 of the Vernon Hotel & Restaurant Supply Co.;

t. On or about August 10, 1945, the defendants issued or caused to be issued Invoice No. 5252 of the Vernon Hotel & Restaurant Supply Co.;

u. On or about September 6, 1945, the defendants issued or caused to be issued Invoice No. 13013 of the Vernon Hotel & Restaurant [6] Supply Co.;

v. On or about December 12, 1945, the defendants issued or caused to be issued Invoice No. 16645 of the Vernon Hotel & Restaurant Supply Co.;

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [7]

COUNT 2

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 4th day of January, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: pork loins, short cuts ("S/C"); pork shoulders, New York ("NY") as shown on Invoice No. 39251 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork loins, short cuts, 26 cents a pound; for pork shoulders, New York, 25 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [8]

COUNT 3

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 21st day of January, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: Grade A veal as shown on Invoice No. 39609 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for said Grade A veal—23 cents a pound: contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [9]

COUNT 4

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 19th day of July, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: pork shoulders, New York ("NY"); pork loins, short cuts ("S/C"), as shown on Invoice No. 41736 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork shoulders, New York — 26 1/4 cents a pound; for pork loins, short cuts — 27 1/2 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [10]

COUNT 5

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 4th day of August, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: pork loins, short cuts ("S/C"); pork shoulders, New York ("NY"); pork legs, as shown on Invoice No. 42076 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork loins, short cuts — 27 1/2 cents a pound; for pork shoulders, New York — 26 1/4 cents a pound; for pork legs — 27 1/2 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [11]

COUNT 6

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 21st day of September, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: pork loins, short cuts ("S/C"); pork shoulders, New York ("NY"), as shown on Invoice No. 13563 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork loins, short cuts, 26 3/4¢ a pound; for pork shoulders, New York, 25 3/4¢ a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [12]

COUNT 7

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 12th day of December, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: pork loins, short cut ("S/C"); pork shoulders, New York ("NY"); Bacon; Hams, as shown on Invoice No. 16645 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork loins, short cut — 27¢ a pound; for pork shoulders, New York — 26¢ a pound; for bacon — 27¢ a pound; for hams — 34 1/4¢ a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [13]

COUNT 8

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 25th day of October, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: Grade A veal, as shown on Invoice No. 44072 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade A veal—22 3/4 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [14]

COUNT 9

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 17th day of September, 1945, in the City of Los Angeles, County of Los Angeles, State

of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil Dvorak certain meat items, to wit: pork loins, short cuts ("S/C"); pork shoulders, New York ("NY"), as shown on Invoice No. 13357 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork loins, short cuts — 26-3/4 cents a pound; for pork shoulders, New York — 25-3/4 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [15]

COUNT 10

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 16th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L.

Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to wit: Grade C beef, as shown on Invoice No. 47443 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade C beef — $18\frac{1}{4}\text{¢}$ a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [16]

COUNT 11

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 20th day of March, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit: Grade B veal

("B Veal"), as shown on Invoice No. 48245 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: Grade B veal — 21 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [17]

COUNTS 12, 13, 14, 15

[Not printed]

COUNT 16

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 22nd day of October, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, *Frederic* Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 14649 of the aforesaid Vernon Hotel & Restaurant Supply Company, showing a total price of \$247.26 and the said entry was false at the time of making of said record, all

of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [22]

COUNT 17

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 8th day of May, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 3729 of the aforesaid Vernon Hotel & Restaurant Supply Company, showing a total sum charged of \$89.10, and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148 thereunder, which had been duly promulgated pursuant to the provisions of

said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [23]

COUNT 18

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 20th day of April, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, *Frederic* Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 3327 of the aforesaid Vernon Hotel & Restaurant Supply Company, showing a total sum charged of \$169.35 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [24]

COUNT 19

[Not printed]

COUNT 20

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 15th day of November, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, *Frederic* Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice No. 15584 of the aforesaid Vernon Hotel & Restaurant Supply Company, showing a total sum charged of \$319.89; and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulations 148, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [26]

COUNT 21

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 26th day of December, 1944, in the City of Los Angeles, County of Los Angeles, State

of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, *Frederic* Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice No. 45741 of the aforesaid Vernon Hotel & Restaurant Supply Company, showing a total sum charged of \$184.95 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [27]

COUNT 22

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 7th day of June, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, *Frederic* Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be

made an entry false in a material respect upon Invoice No. 4437 of the aforesaid Vernon Hotel & Restaurant Supply Company, showing a total sum charged of \$453.17; and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulations 148, 169, 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [28]

COUNT 23

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 29th day of November, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to-wit: pork bellies, hogs, back fat, as shown on Invoice No. 44976 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items per-

mitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork bellies — 21 3/4 cents a pound; hogs — 21 1/2 cents a pound; back fat — 13 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [29]

COUNT 24

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 7th day of December, 1944, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to wit: Packer hogs as shown on Invoice No. 45217 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act,

which maximum price per pound under the aforesaid Act and regulations then was: for packer hogs, 21½¢ a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [30]

COUNT 25

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 26th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to wit: packer hogs as shown on Invoice No. 47682 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for packer hogs 21 1/2 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [31]

COUNTS 26, 27, 28, 29

[Not printed]

COUNT 30

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 14th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George A. Veuhoff) certain meat items, to wit: Grade C beef ("C beef") as shown on Invoice No. 47374 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for grade C beef — 18-1/4 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [36]

COUNT 31

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 13th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit: Grade CC beef, Grade C beef, as shown on Invoice No. 47348 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for Grade CC beef — $15\frac{1}{2}$ cents a pound; for Grade C beef — $18\frac{1}{4}$ cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [37]

COUNT 32

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present :

That on or about the 26th day of January, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit: hams, bacon, as shown on Invoice No. 46740 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for hams -- 34 cents a pound; for bacon -- 27 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [38]

COUNT 33

(50 U. S. C. App. 901 et seq.)

And the Grand Jurors aforesaid, upon their oaths aforesaid do further charge and present:

That on or about the 5th day of February, 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit: hams, as shown on Invoice No. 47034 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for hams — 34 cents a pound; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [39]

COUNTS 34, 35, 36, 37, 38, 39, 40

[Not printed]

CHARLES H. CARR

United States Attorney [46]

A true bill, John D. Boyle, Foreman.

Bail, \$10,000 each deft.

[Endorsed]: Filed Mar. 11, 1946. [47]

In the District Court of the United States in and for the
Southern District of California

Central Division

Crim. No. 18367

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM SHUBIN, FREDERICK ALEXANDER
SHUBIN, and JACK L. KISSEL,

Defendants.

MOTION OF DEFENDANTS WILLIAM SHUBIN,
FREDERICK ALEXANDER SHUBIN AND
JACK L. KISSEL, FOR A BILL OF PAR-
TICULARS

Come now defendants William Shubin, Frederick Alexander Shubin, and Jack L. Kissel, by their attorneys, McLaughlin, McGinley & Hanson, and respectfully move this Court to require plaintiff to furnish a Bill of Particulars with respect to the matters hereinafter set forth:

I.

As to each of subparagraphs a, b, c, d, and e of paragraph 2 of Count 1, on pages 2 and 3 of said indictment, state who the others are that defendants conspired to cause to do the acts referred to in the above mentioned subparagraphs.

II.

As to subparagraph f of paragraph 2 of Count I, on page 3 of said indictment, state:

1. Who the persons are that are referred to therein as [48] divers persons;

2. What provisions of the Price Control Act of 1942 or of any maximum price regulation would have been or was violated by the acts of defendants in persuading other persons to make false and untrue and fraudulent entries upon the records of such other persons.

III.

As to subparagraph g of paragraph 2 of Count I, on page 3 of said indictment, state what provisions of the Price Control Act of 1942, or of any maximum price regulation would have been or were violated by the acts of defendants in persuading other persons to make false and untrue and fraudulent entries upon the records of such other persons.

IV.

As to subparagraph h of paragraph 2 of Count 1, on page 3 of said indictment, state in what way defendants planned to secure gains and profits from the acts described under the preceding subparagraphs.

V.

As to subparagraph a of paragraph 3 of Count I, on page 3 of said indictment, state how the entry of defendants into a partnership violated any provisions of the Price Control Act of 1942, or any maximum price regulation promulgated pursuant thereto.

VI.

As to subparagraphs b to j, inclusive, of paragraph 3 of Count I, on pages 3 and 4, state:

1. The exact date upon which each of the entries referred to in said paragraphs were made.

2. State in what respect each of such entries was false.

3. State the specific provision or portion of the [49] maximum price regulations which were violated by the acts described in said subparagraphs.

VII.

As to subparagraphs k to p, inclusive, of paragraph 3 of Count I, on page 5 of the indictment, state:

1. How and in what manner the issuance of the checks described in each such subparagraph violated any provision of the Emergency Price Control Act of 1942, or of any price regulation promulgated pursuant thereto.

2. State what act or thing referred to in each of said subparagraphs violated or offended any provision of the Emergency Price Control Act of 1942, or any price regulation promulgated pursuant thereto.

VIII.

As to subparagraphs q to v, inclusive, of paragraph 3 of Count I, on pages 5 and 6 of the indictment, state:

1. How and in what manner the invoices referred to in each such paragraph violated any provision of the Emergency Price Control Act of 1942, or any price regulation promulgated pursuant thereto.

2. State what act or thing referred to in each of said subparagraphs violated or offended any provision of the Emergency Price Control Act of 1942, or any price regulation promulgated pursuant thereto.

IX.

As to Counts 2 to 11, inclusive, of said indictment, pages 7 to 16, inclusive, state:

1. The exact date upon which each of the unlawful acts took place, that is, the exact date of the offer, the solicitation, the attempt, the agreement to sell, and the sale.

2. State whether the maximum price per pound for meat as alleged in each of said counts, is the maximum price for [50] retailers, wholesalers, jobbers, packers, or slaughterers.

3. State whether defendants made the sales described in each of said counts as retailers, wholesalers, jobbers, packers, or slaughterers.

4. State the specific portion or provisions of the Maximum Price Regulation 169 which were violated by each of such sales, and which fixed the maximum price at the figure specified in each of such counts.

5. State to what the term "doing business as afore-said" in each of said counts refers.

X.

As to Count 12, on page 17 of said indictment, state:

1. The exact date upon which the alleged false entry was made.

2. State in what respect said entry was false.

3. State the specific provision of portion of Maximum Price Regulations numbers 148, 169, and 239 which were violated by the acts described in said Count 12.

XI.

As to Counts 13 and 14 on pages 18 and 19 of said indictment, and Counts 16 to 22, inclusive, on pages 21 to 27, inclusive, of said indictment, state:

1. The exact date upon which each of the false entries were made.

2. State in what respect each of the records and invoices referred to in each of said counts was false.

3. State the specific provision or portion of Maximum Price Regulations 148 and 169 which was violated by the acts described in each of said counts, and which required the invoice referred to in each of such counts to be kept.

XII.

As to Count 15 on page 20 of said indictment, state: [51]

1. The exact date upon which each of the false entries were made.

2. State in what respect each of the records and entries referred to in each of said counts was false.

3. State the specific provision or portion of Maximum Price Regulations 148, 165, 169, and 239 which was violated by the acts described in each of said counts, and which required the records and invoices referred to in each of such counts to be kept.

XIII.

As to Counts 23 to 34, inclusive, on pages 28 to 39, inclusive, of said indictment, state:

1. The exact date upon which each of the unlawful acts took place, that is, the exact date of the offer, the

solicitation, the attempt, the agreement to sell, and the sale.

2. State whether the maximum price per pound for meat as alleged in each of said counts, is the maximum price for retailers, wholesalers, jobbers, packers, or slaughterers.

3. State whether defendants made the sales described in each of said counts as retailers, wholesalers, jobbers, packers, or slaughterers.

4. State the specific portion or provisions of the Maximum Price Regulations 148, 169, and 239 which were violated by each of such sales, and which fixed the maximum price at the figure specified in each of such counts.

5. State to what the term "doing business as afore-said" in each of said counts refers.

XIV.

As to Count 35 on page 40 of said indictment, and Count 38 on page 43, state:

1. The exact date on which each of the false entries was made. [52]

2. State in what respect each of the invoices was false.

3. State the specific provision or portion of Maximum Price Regulations 148, 169, and 239 which was violated by the acts described in each of said counts, and which required the invoice referred to in each of such counts to be kept.

XV.

As to Counts 36 and 37, on pages 41 and 42 of the indictment, and Counts 39 and 40 on pages 44 and 45, state:

1. The exact date on which each of the false entries was made.

2. State in what respect each of the records and invoices referred to in each of said counts was false.

3. State the specific provision or portion of Maximum Price Regulations 148, 169, and 239 which was violated by the acts described in each of said counts, and which required the invoice referred to in each of such counts to be kept.

This motion is made upon the grounds that the indictment herein does not state sufficient facts to inform the defendants of the charges they will have to meet on the trial of this proceeding, or to enable these defendants to prepare their defense, and that the indictment is so general and indefinite that defendants cannot safely proceed to trial without the aid of a Bill of Particulars, and that they are entitled to such Bill of Particulars.

The motion is based upon the indictment on file herein, this motion, the points and authorities in support of this motion, and the affidavit of William Shubin in support of such motion.

Dated at Los Angeles, California, this 28th day [53] of March, 1946.

McLAUGHLIN, McGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants William Shubin, Frederick Alexander Shubin, and Jack L. Kissel [54]

Received copy of the within Motion this 30th day of March, 1946. Charles H. Carr, U. S. Atty., Attorney for Plaintiff, by M. Wentworth.

[Endorsed]: Filed Mar. 30, 1946. [55]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS WILLIAM SHUBIN,
FREDERICK ALEXANDER SHUBIN, AND
JACK L. KISSEL TO DISMISS

Come now defendants William Shubin, Frederick Alexander Shubin, and Jack L. Kissel, by their attorneys, McLaughlin, McGinley & Hanson, and respectfully move the above entitled Court for an Order dismissing the above entitled proceedings, the indictment, and each of the counts therein.

The grounds of said motion are:

1. That the indictment does not state facts sufficient to constitute an offense against the plaintiff;
2. None of the counts in said indictment states facts sufficient to constitute an offense against the plaintiff;
3. The indictment and each of the counts therein are uncertain in each of the respects more particularly set forth in the motion of these defendants for a Bill of Particulars, and reference is hereby made to said motion on file for a more [56] specific statement of the respects in which said indictment is uncertain, and the particulars which must be furnished to cure such uncertainties.

Said motion will be based upon the indictment and other papers on file in the above entitled action.

Dated: April 1, 1946.

McLAUGHLIN, MCGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants William Shubin, Frederick
Alexander Shubin, and Jack L. Kissel

[Endorsed]: Filed Apr. 1, 1946. [57]

[Minutes: Monday, April 1, 1946]

Present: The Honorable Leon R. Yankwich, District Judge.

This cause coming on during the morning session for (1) hearing motions of defendants to dismiss and for Bill of Particulars; and (2) for plea of all defendants; Wm. Strong, Assistant U. S. Attorney, appearing as counsel for the Government; James A. McLaughlin, Esq., appearing as counsel for the defendants William A. Shubin, Frederick Alexander Shubin, and Jack L. Kissel, who are all present on bond; it is ordered that the cause be, and it hereby is, continued to 2 P. M. for the said proceedings.

At 2:10 P. M. court reconvenes in this case and all being present as before, on the basis of arguments made by counsel in Case No. 18,366, it is ordered that motions of defendants to dismiss and for Bill of Particulars is hereby denied.

Attorney McLaughlin waives reading of the Indictment. Defendants William A. Shubin, Frederick Alexander Shubin, and Jack L. Kissel each plead not guilty to each and every count of the Indictment, and it is stipulated and so ordered that plea of not guilty of each defendant be considered as though made to each count separately read.

It is ordered that the cause be, and it hereby is, set for trial on June 18, 1946, at 10 A. M. [58]

[Title of District Court and Cause.]

DEFENDANTS' REQUESTED JURY
INSTRUCTIONS NUMBERS 1 TO 19 INCLUSIVE

Defendants' Requested Instruction No. 1

Conspiracy out

A defendant is not guilty of an offense charged in the indictment merely because he might have known that someone else was violating such regulations or law, unless the evidence satisfies you beyond a reasonable doubt that such defendants assisted in the commission of that offense, or unless that offense was committed pursuant to an agreement by such defendant that such offense would be committed.

Given:

Refused:✓.....

Modified:

J. F. T. O'C.

Judge [60]

Defendants' Requested Instruction No. 3

Conspiracy

It is not sufficient evidence to prove a conspiracy to merely prove that one or more parties has violated a criminal statute. The doing of an unlawful act does not show a conspiracy unless the evidence shows that the means employed by the party or parties to do the unlawful act were also unlawful.

No

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge

United States v. Food and Grocery Bureau of
Southern California, District Court, S. D., Cali-
fornia, 1942, 43 Fed. Supp. 966, at 973. [61]

Defendants' Requested Instruction No. 5

Good Faith

Not given

A contrivance or device to evade provisions of an Of-
fice of Price Administration regulation may be unlawful;
yet, if the defendant in good faith conscientiously be-
lieves that he was not violating the law in anything that
he did or failed to do, as shown by the evidence, then he
is not guilty of wilfully violating such regulation. This
is true, notwithstanding that his act or omission may as
a matter of law constitute an evasion of the provisions
of a regulation.

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge

United States v. Steiner, Circuit Court, 7th Cir-
cuit, 1945, 152 Fed. 2d. 484, at 488. [62]

Defendants' Requested Instruction No. 6

Knowledge and Intention

no

Before rendering a verdict against any defendant, you must be satisfied beyond a reasonable doubt that such defendant or defendants had knowledge of the provision of the regulation violated, and that such defendant or defendants nevertheless intentionally violated such regulation by committing an act contrary thereto.

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge [63]

Defendants' Requested Instruction No. 8

Regulations—Knowledge

In determining whether any defendant violated the provisions of any regulation issued by the Office of Price Administration, you are entitled to take into consideration the possibility of confusion or lack of understanding by such defendant, resulting from language contained in such regulation or any amendment to such regulation which may be involved.

No

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge [64]

Defendants' Requested Instruction No. 9

Regulations—Prohibitions Contained Therein No

If any purchaser purchasing meat products from the defendants or any of them was not requested or required by the defendants to pay a price in excess of the ceiling price fixed by such regulations, but nevertheless did leave with the defendants or any of them moneys in excess of the ceiling price, that does not constitute a violation of the regulations or the law involved, and if you should find that any of the counts in this indictment involve any such transaction or transactions with respect to a purchaser, then you shall find for the defendants.

Given:

Refused:✓.....

Modified:

J. F. T. O'C.

Judge [65]

Defendants' Requested Instruction No. 10

Responsibility of One Partner for Acts of Another

Not given

One partner cannot be prosecuted for a crime committed by his copartner so long as the partnership is engaged in a lawful business or enterprise, unless such partner performed the criminal act as a part of the partnership business and with the knowledge and consent of such other partner. Except as herein stated, neither the firm nor a partner is chargeable criminally with the acts of a copartner merely by reason of the partnership relation.

Given:
Refused:√.....
Modified:

J. F. T. O'C.

Judge

Levin v. United States, 9th Circuit, 1925, 5 Fed.
2d. 598;

47 Corpus Juris, 907;

Pearson v. United States, 9th Circuit, 1945, 147
Fed. 2d. 950;

United States v. Food and Grocery Bureau of
Southern California, District Court, S. D. Cali-
fornia, March, 1942, 43 Fed. Supp. 966;

22 Corpus Juris Secundum, page 149, et seq. [66]

Defendants' Requested Instruction No. 12

Sales

Not g

If any purchaser purchasing meat products from the defendants or any of them was not requested or required by the defendants to pay a price in excess of the ceiling price fixed by such regulations, but nevertheless did leave with the defendants or any of them moneys in excess of the ceiling price, it is for you to determine whether such additional moneys were given to the defendant or defendants by way of gratuity or as further consideration for the purchase of the meat.

Given:
Refused:√.....
Modified:

J. F. T. O'C.

Judge [67]

Defendants' Requested Instruction No. 13

Sales

No

The regulations which the defendants are charged with violating relate to persons who make sales of meat other than at retail, and you are not to consider any sales made at retail in determining the innocence or guilt of the defendants. You are to disregard all evidence of sales made by the defendants to any person or persons at retail.

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge [68]

Defendants' Requested Instruction No. 14

Search and Seizure

No

As to the witnesses who identified themselves as being connected with the Department of Internal Revenue, if you believe that their testimony was given after they refreshed their recollection by examining the papers or documents in the custody of the Department of Internal Revenue or which came from that department, you should disregard such testimony.

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge [69]

Defendants' Requested Instruction No. 15

Search and Seizure

Not g

As to the witnesses who identified themselves as being connected with the Department of Internal Revenue, if you believe that their testimony was given after they refreshed their recollection by examining any documents or records in the custody of the Department of Internal Revenue, or which were in the custody of that department and which related to the personal income tax returns of the defendants, or any of them, then you should disregard such testimony.

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge [70]

Defendants' Requested Instruction No. 20

No

If you find that any statements which any of the agents of the Internal Revenue Department testified defendants made were made or given by such defendant under compulsion or fear of prosecution, then you must disregard such statements in determining the innocence or guilt of such defendant or defendants.

Given:

Refused:√.....

Modified:

J. F. T. O'C.

Judge

[Endorsed]: Filed Jun. 21, 1946. [71]

[Minutes: Friday, June 21, 1946]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for further jury trial on counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 18, 20, 21, 22, 23, 24, 25, 30, 31, 32, 33 against all three defendants; William Strong, Special Assistant to the U. S. Attorney, and N. W. Neukom, Assistant U. S. Attorney, appearing as counsel for the Government; James A. McLaughlin, Esq., appearing as counsel for the defendants William A. Shubin, Frederick Alexander Shubin, and Jack L. Kissel, who are present; and the jury being absent; at 9:29 A. M. court reconvenes herein and counsel go over instructions to the jury.

At 10:30 A. M. the jury return into the court room and all being present as before, counsel stipulate that the defendants and the jurors are present, and all being present, the Court orders that the trial proceed.

At 10:33 A. M. Attorney Strong commences his argument to the jury, and at 10:55 A. M. closes his argument to the jury.

At 10:55 A. M. Attorney McLaughlin commences his argument to the jury. At 11:25 A. M. Attorney Neukom commences his argument for the Government in reply.

At 11:38 A. M. the jury is admonished and court recesses until 2 P. M. In the absence of the jury the Court discusses further the proposed instructions to the jury. At 11:48 A. M. court recesses until 2 P. M.

At 2 P. M. court reconvenes and all being present as before, [72] including the defendants and the jury, and

counsel stipulating that the jury and the defendants are present, Juror No. 1 is excused because of the funeral of his brother, and alternate juror F. P. Powell takes a place as a regular juror in place of Juror No. 1.

At 2:13 P. M. the court instructs the jury on the law of this case and there are no exceptions to the charge. At 3:40 P. M. Bailiffs Hames and Kottner are sworn as officers to take charge of the jury during its deliberation upon a verdict. Alternate Juror Wm. N. Bucklin, Jr., is excused, and the jury retires for deliberation upon a verdict.

At 5:57 P. M. court reconvenes and the jury being present and all the defendants and counsel being present except Attorney Neukom, the court instructs the jury further, and the jury again retire at 6 P. M. to deliberate further.

At 6:08 P. M. court recesses until 7:30 P. M. and it is ordered that the jury be taken to dinner at the expense of the Government. At 6:15 P. M. the jury go to dinner in charge of Bailiffs Hames and Kottner. (Taix Restaurant.)

At 7:20 P. M. the jury return from dinner and deliberate further.

At 8:35 P. M. the jury return into court and all being present as before, including the defendants, the jury, and all counsel, viz. Attorneys Strong, Neukom, and McLaughlin, and counsel stipulating that the defendants and the jury are present, the jury through its Foreman states it has agreed upon verdicts, and the said verdicts are presented and read in open court, and it is ordered that the

said verdicts be filed and spread upon the minutes, the said verdicts as filed being as follows:

* * * * *

The jury is excused until notified. It is ordered that the cause be referred to the Probation Officer for presentence investigation and report and continued hereby to June 28, 1946, at 10 A. M., for hearing the said report, which the court orders must be returned not later than 10 A. M., June 28, 1946, and it is ordered that if motion for new trial is made, it will be heard on June 28, 1946, at 10 A. M., and defendants will be present at that time. [73]

[Title of District Court and Cause.]

[VERDICT]

We, the jury in the above entitled case, find the defendant William A. Shubin, charged as William Shubin:

Guilty as charged in the first count of the Indictment;
Guilty as charged in the second count of the Indictment;
Guilty as charged in the third count of the Indictment;
Guilty as charged in the fourth count of the Indictment;
Guilty as charged in the fifth count of the Indictment;
Guilty as charged in the sixth count of the Indictment;
Guilty as charged in the seventh count of the Indictment;
Guilty as charged in the eighth count of the Indictment;
Guilty as charged in the ninth count of the Indictment;
Guilty as charged in the tenth count of the Indictment;
Guilty as charged in the eleventh count of the Indictment;

Guilty as charged in the sixteenth count of the Indictment;

Guilty as charged in the seventeenth count of the Indictment;

Guilty as charged in the eighteenth count of the Indictment;

Guilty as charged in the twentieth count of the Indictment;

Guilty as charged in the twenty-first count of the Indictment;

Guilty as charged in the twenty-second count of the Indictment;

Guilty as charged in the twenty-third count of the Indictment;

Guilty as charged in the twenty-fourth count of the Indictment;

Guilty as charged in the twenty-fifth count of the Indictment;

Guilty as charged in the thirtieth count of the Indictment;

Guilty as charged in the thirty-first count of the Indictment;

Guilty as charged in the thirty-second count of the Indictment;

Guilty as charged in the thirty-third count of the Indictment.

Dated: Los Angeles, Calif., June 21st, 1946.

O. P. CONRAD

Foreman of the Jury

[Endorsed]: Filed Jun. 21, 1946. [74]

[Title of District Court and Cause.]

[VERDICT]

We, the jury in the above entitled case, find the defendant Frederick Alexander Shubin:

Guilty as charged in the first count of the Indictment;

Not Guilty as charged in the second count of the Indictment;

Not Guilty as charged in the third count of the Indictment;

Not Guilty as charged in the fourth count of the Indictment;

Not Guilty as charged in the fifth count of the Indictment;

Not Guilty as charged in the sixth count of the Indictment;

Not Guilty as charged in the seventh count of the Indictment;

Not Guilty as charged in the eighth count of the Indictment;

Not Guilty as charged in the ninth count of the Indictment;

Not Guilty as charged in the tenth count of the Indictment;

Not Guilty as charged in the eleventh count of the Indictment;

Guilty as charged in the sixteenth count of the Indictment;

Guilty as charged in the seventeenth count of the Indictment;

Guilty as charged in the eighteenth count of the Indictment;

Guilty as charged in the twentieth count of the Indictment;

Guilty as charged in the twenty-first count of the Indictment;

Guilty as charged in the twenty-second count of the Indictment;

Not Guilty as charged in the twenty-third count of the Indictment;

Not Guilty as charged in the twenty-fourth count of the Indictment;

Not Guilty as charged in the twenty-fifth count of the Indictment;

Not Guilty as charged in the thirtieth count of the Indictment;

Not Guilty as charged in the thirty-first count of the Indictment;

Not Guilty as charged in the thirty-second count of the Indictment;

Not Guilty as charged in the thirty-third count of the Indictment.

Dated: Los Angeles, Calif., June 21st, 1946.

O. P. CONRAD

Foreman of the Jury

[Endorsed]: Filed Jun. 21, 1946. [75]

[Title of District Court and Cause.]

[VERDICT]

We, the jury in the above entitled case, find the defendant Jack L. Kissel:

Guilty as charged in the first count of the Indictment;

Guilty as charged in the second count of the Indictment;

Guilty as charged in the third count of the Indictment;

Guilty as charged in the fourth count of the Indictment;

Guilty as charged in the fifth count of the Indictment;

Guilty as charged in the sixth count of the Indictment;

Guilty as charged in the seventh count of the Indictment;

Guilty as charged in the eighth count of the Indictment;

Guilty as charged in the ninth count of the Indictment;

Guilty as charged in the tenth count of the Indictment;

Guilty as charged in the eleventh count of the Indictment;

Guilty as charged in the sixteenth count of the Indictment;

Guilty as charged in the seventeenth count of the Indictment;

Guilty as charged in the eighteenth count of the Indictment;

Guilty as charged in the twentieth count of the Indictment;

Guilty as charged in the twenty-first count of the Indictment;

Guilty as charged in the twenty-second count of the Indictment;

Guilty as charged in the twenty-third count of the Indictment;

Guilty as charged in the twenty-fourth count of the Indictment;

Guilty as charged in the twenty-fifth count of the Indictment;

Guilty as charged in the thirtieth count of the Indictment;

Guilty as charged in the thirty-first count of the Indictment;

Guilty as charged in the thirty-second count of the Indictment;

Guilty as charged in the thirty-third count of the Indictment.

Dated: Los Angeles, Calif., June 21st, 1946.

O. P. CONRAD

Foreman of the Jury

[Endorsed]: Filed Jun. 21, 1946. [76]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS WILLIAM SHUBIN,
FREDERICK ALEXANDER SHUBIN, AND
JACK L. KISSEL FOR A NEW TRIAL.

Come now William Shubin, Frederick Alexander Shubin, and Jack L. Kissel, Defendants, through their attorneys, McLaughlin, McKinley & Hanson, and each respectfully moves the above entitled court for a new trial for the following reasons:

1. The court erred in denying each of the defendants' motions for acquittal made at the conclusion of the evidence.

2. The verdict is contrary to the weight of the evidence.

3. The verdict is not supported by substantial evidence.

4. The court erred in sustaining objections to questions addressed to the witnesses Joseph Brady and William Strong.

5. The court erred in admitting testimony of the [77] witnesses Donald Oliver Bircher, Samuel J. Phoebus, and James Bryant Eustice.

6. The court erred in admitting in evidence the plaintiff's Exhibit No. 58, the same being an auditor's statement prepared under the supervision of Joseph Brady, the defendants' tax counsel, and delivered to the Government witness, Bircher, there being no evidence that the defendants William Shubin or Frederick Alexander Shubin consented to such delivery or waived the privilege accorded them under subdivision 2 of Section 1881 of the Code of Civil Procedure.

7. The court erred in charging the jury and in refusing to charge the jury as requested.

Dated: June 25, 1946.

McLAUGHLIN, McGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants [78]

Received copy of the within Motion this 26 day of June, 1946. James M. Carter, U. S. Atty., by U. Allen.

[Endorsed]: Filed Jun. 26, 1946. [79]

[Minutes: Friday, July 5, 1946]

Present: The Honorable J. F. T. O'Connor, District Judge.

This cause coming on for hearing on reports of the Probation Officer and sentence of the defendants William Shubin, Jack L. Kissel and Frederick Alexander Shubin; Wm. Strong, Esq., Special Asst. U. S. Attorney, and Norman W. Neukom, Esq., Assistant U. S. Attorney, appearing for the Government; James A. McLaughlin, Esq., appearing for the defendants, the said defendants being present:

Attorney McLaughlin makes a statement in support of motion for new trial as to all defendants. Motions for new trial are denied and exception noted for each defendant. Attorneys Strong and McLaughlin make statements. The Court makes a statement. The defendant William Shubin makes a statement. The defendant Jack L. Kissel has nothing to say. The defendant Frederick Alexander Shubin has nothing to say. The Court pronounces judgment against the defendants as follows:

* * * * * [80]

District Court of the United States

Southern District of California

Central Division

No. 18367

Criminal Indictment in forty counts for violation
of U. S. C., Title 18, Sec. 88, Title 50, App. Section
901, et seq.

UNITED STATES

v.

WILLIAM A. SHUBIN, charged as WILLIAM
SHUBIN

JUDGMENT AND COMMITMENT

On this 5th day of July, 1946, came the United States Attorney, and the defendant William A. Shubin appearing in proper person, and with his attorney ~~William~~ James A. McLaughlin, and,

The defendant having been convicted on verdict of jury of guilty of the offense charged in the Indictment, in the above-entitled cause, to wit: On counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 18, 20, 21, 22, 23, 24, 25, 30, 31, 32 and 33 on the charges as therein contained in the Indictment on file, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year in the county jail and to pay unto the United States a fine of \$5000. on the first count; and on each of counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 18, 20, 21, 22, 23, 24, 25, 30, 31, 32 and 33 defendant is ordered to be imprisoned in the County Jail for six months and to pay a fine of \$1000.00, the jail sentences of six months on the aforementioned counts to run concurrently with the one year jail sentence of one year on the first count and defendant to stand committed for the non-payment of the fines, the sentence for non-payment of fines, in the event any of the said fines are not paid, to commence after the expiration of the one year jail sentence.

(Note: Total jail sentence is one year and total fines are \$28,000.00.)

It Is Further Ordered that the fines may be paid at the rate of \$1000.00 a month commencing July 8th, 1946; that the said fines be paid into the registry of the court pending appeal; that defendant be released on his own recognizance pending appeal, the defendant through his counsel having stated in open court that he elects at this time not to commence the service of his sentence until the appeal is determined.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United

States Marshal or other qualified officer and that the same shall serve as the commitment herein on the first count.

(See reverse)

(Signed) J. F. T. O'CONNOR

United States District Judge

The Court recommends commitment to a county jail type institution.

Filed

~~A True Copy.~~ Certified this 5th day of July, 1946.

(Signed) EDMUND L. SMITH

Clerk

(By) Francis E. Cross

Deputy Clerk [81]

Defendant having indicated his intention of appealing from the judgment, at the request of said defendant, the time for filing proposed bill of exceptions is enlarged to Sept. 9, 1946.

J. F. T. O'CONNOR

Judge [82]

District Court of the United States
Southern District of California
Central Division

No. 18367

Criminal Indictment in forty counts for violation of
U. S. C., Title 18, Sec. 88, Title 50, App. Section
901, et seq.

UNITED STATES

v.

FREDERICK ALEXANDER SHUBIN

JUDGMENT AND COMMITMENT

On this 5th day of July, 1946, came the United States
Frederick

Attorney, and the defendant \wedge Alexander Shubin appearing in proper person, and with his attorney James A. McLaughlin, and,

The defendant having been convicted on verdict of jury of guilty of the offense charged in the Indictment, in the above-entitled cause, to wit: one, sixteen, seventeen, eighteen, twenty, twenty-one and twenty-two, on the charges as therein contained in the Indictment on file, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of six months

and to pay a fine of \$2500.00 on the first count; and on each of counts 16, 17, 18, 20, 21 and 22 defendant is ordered to be imprisoned in the county jail for three months and to pay a fine in the sum of \$500.00, the jail sentences of three months on the aforesaid counts to run concurrently with the six months' jail sentence on the first count, and defendant to stand committed for the non-payment of the fines, the sentence for non-payment of fines, in the event any of the fines are not paid, to commence after the expiration of the six months' jail sentence.

Note: Total jail sentence is six months, and total fines are \$5500.00.

It is Further Ordered that the fines may be paid at the rate of \$500.00 a month commencing July 8th, 1946; that the said fines be paid into the registry of the court pending appeal; that defendant be released on his own recognizance pending appeal, the defendant through his counsel having stated in open court that he elects at this time not to commence the service of his sentence until the appeal is determined.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein on the first count.

(See reverse)

(Signed) J. F. T. O'CONNOR

United States District Judge

The Court recommends commitment to a county jail type institution.

Filed

~~A True Copy.~~ Certified this 5th day of July, 1946.

(Signed) EDMUND L. SMITH

Clerk

(By) Francis E. Cross

Deputy Clerk [83]

Defendant having indicated his intention of appealing from the judgment, at the request of said defendant, the time for filing proposed bill of exceptions is enlarged to Sept. 9, 1946.

J. F. T. O'CONNOR

Judge [84]

District Court of the United States

Southern District of California

Central Division

No. 18367

Criminal Indictment in forty counts for violation of U. S. C., Title 18, Sec. 88, Title 50, App. Section 901, et seq.

UNITED STATES

v.

JACK L. KISSEL

JUDGMENT AND COMMITMENT

On this 5th day of July, 1946, came the United States Attorney, and the defendant Jack L. Kissel appearing in proper person, and with his attorney James A. McLaughlin, and,

The defendant having been convicted on verdict of jury of guilty of the offense charged in the Indictment in the above-entitled cause, to wit: on counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 18, 20, 21, 22, 23, 24, 25, 30, 31, 32 and 33 on the charges as therein contained in the Indictment on file, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one year in the county jail and to pay unto the United States a fine of \$5000.00 on the first count; and on each of counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 18, 20, 21, 22, 23, 24, 25, 30, 31 32 and 33 defendant is ordered to be imprisoned in the County Jail for six months and to pay a fine of \$1000.00 the jail sentences of six months on the aforementioned counts to run concurrently with the one year jail sentence of the first count, and defendant to stand committed for the non-payment of the fines, the sentence for non-payment of fines, in the event any of the said fines are not paid, to commence after the expiration of the one year jail sentence.

(Note: Total jail sentence is one year and total fines are \$28,000.00.

It Is Further Ordered that the fines may be paid at the rate of \$1000.00 a month commencing July 8th, 1946; that the said fines be paid into the registry of the court

pending appeal; that defendant be released on his own recognizance pending appeal, the defendant through his counsel having stated in open court that he elects at this time not to commence the service of his sentence until the appeal is determined.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein on the first count.

(See reverse)

(Signed) J. F. T. O'CONNOR

United States District Judge

The Court recommends commitment to county jail type institution.

Filed

A True Copy. Certified this 5th day of July, 1946.

(Signed) EDMUND L. SMITH

Clerk

(By) Francis E. Cross

Deputy Clerk [85]

Defendant having indicated his intention of appealing from the judgment, at the request of said defendant, the time for filing proposed bill of exceptions is enlarged to Sept. 9, 1946.

J. F. T. O'CONNOR

Judge [86]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Names and Addresses of Appellants: William Shubin, 4551 Brompton Avenue, Bell, California; Frederick Alexander Shubin, 2767 Laurel Place, Southgate, California; and Jack L. Kissel, 1525 Nairn Avenue, Los Angeles 22, California.

Name and Address of Appellants' Attorneys: McLaughlin, McGinley & Hanson and James A. McLaughlin, 1224 Bank of America Building, Los Angeles 14, California.

Offense: Violation of provisions of Emergency Price Control Act of 1942, and conspiracy to violate provisions of Emergency [87] Price Control Act of 1942.

Date of Judgment: July 5, 1946.

Brief Description of Judgment and Sentence: \$5,000.00 fine and one year in jail on conspiracy charge as to William Shubin and Jack L. Kissel; William Shubin and Jack L. Kissel each also fined the sum of \$1,000.00 on each of 24 counts charging violations of above mentioned Act, and in addition they were each given a sentence of six months in jail as to each of such 24 counts, such sentences to run concurrently with one another and with the sentence on the conspiracy charge.

Frederick Alexander Shubin was fined \$2,500.00 and six months in jail on the conspiracy charge, and the sum of \$500.00 and three months in jail on each of counts 16, 17, 18, 20, 21 and 22, such sentences to run concurrently with one another and with the sentence on the conspiracy charge.

Name of Prison Where Now Confined, if Not on Bail: None.

We, the above named appellants do each hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above mentioned, on the grounds set forth below, and pursuant to the provisions of Rule 38 of the Federal Rules of Criminal Procedure for the District Courts of the United States, we elect not to commence the service of our sentences pending the determination of our appeals.

Dated: July 9, 1946.

WILLIAM SHUBIN, Appellant

FREDERICK ALEXANDER SHUBIN, Appellant

JACK L. KISSEL, Appellant [88]

McLAUGHLIN, MCGINLEY & HANSON

By James A. McLaughlin

Attorneys for Appellants

GROUND OF APPEAL

1. The trial court erred in admitting into evidence defendants' partnership income tax returns which were made by the defendants under the compulsion of the law and which were used against the defendants in violation of their constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

2. Supplemental income tax returns of these individual defendants were procured by plaintiff's counsel from the Commissioner of Internal Revenue and from the Department of Internal Revenue unlawfully, in violation of the statutes and regulations relating to the use of returns, and without pursuing the procedure prescribed by said

regulations. The information disclosed in such returns was used by plaintiff's attorneys in securing the indictment against these defendants, in preparing agents of the Bureau of Internal Revenue to give testimony at the trial, and in refreshing the memories of such agents with respect to testimony later given, all in violation of such statutes and regulations and in violation of the defendants' constitutional rights under the Fourth and Fifth Amendments.

3. The trial court erred in admitting into evidence testimony of agents of the Department of Internal Revenue given after using such returns for the purpose of refreshing their recollections, in violation of the statutes, regulations, and provisions of the Constitution mentioned under the preceding paragraph. [89]

4. There was no evidence tending to show the existence of a conspiracy other than admissions made by the three defendants to the agents of the Bureau of Internal Revenue in connection with the preparation of supplemental income tax returns, and such admissions are insufficient to prove a conspiracy as they were not made in furtherance of any conspiracy, nor were they made by defendants in the presence of one another.

5. The trial court erred in admitting into evidence an accountant's statement prepared under the supervision of defendants' tax attorney and delivered by such attorney to agents of the Department of Internal Revenue, there being no showing that the defendants William Shubin or Frederick Alexander Shubin ever waived the privilege accorded to them under this document by subsection 2 of Section 1881 of the Code of Civil Procedure of the State of California.

6. The evidence was insufficient to sustain the verdict and judgment in that there was no proof made of the terms of the regulations of the Office of Price Administration which were alleged to have been violated, and there was no proof of the defendants' knowledge of such terms, and in this connection the court erred in refusing the defendants' requested instructions to the jury on the issue of knowledge and good faith.

7. The trial court erred in refusing to receive evidence to show that plaintiff's attorneys had used the supplemental income tax returns of the defendants in their preparation for the trial of this case, and in securing the indictment, after the trial court had ruled that such supplemental income tax returns were not admissible in evidence.

8. The trial court erred in refusing to give jury instructions requested by defendants.

9. The trial court erred in refusing to grant the defendants' motion for judgment of acquittal made at the close [90] of the trial.

10. The trial court erred in refusing to grant defendants' motion for a new trial on each of the grounds stated in such motion.

11. The penalties imposed by the trial court in the form of sentences and fines are excessive.

McLAUGHLIN, McGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants and Appellants

[Endorsed]: Filed Jul. 9, 1946. [91]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON APPEAL

Comes now the above named defendants and appellants and in connection with the above entitled appeal hereby set forth the points upon which they intend to rely on appeal:

I.

The District Court erred in receiving in evidence and in denying defendants' motion to strike testimony of four witnesses from the Bureau of Internal Revenue on each of the following grounds:

1. The testimony given by those witnesses was from information obtained in the course of their official duties and was privileged and confidential and its disclosure constituted a violation of defendant's constitutional rights under the Fourth and Fifth Amendments. [92]

2. The testimony of those witnesses was from information obtained by them in the course of their official duties and plaintiff did not lawfully obtain permission of the Commissioner of Internal Revenue to use the information which such witnesses had, in that there was no compliance with the laws and regulations relating to the obtaining or use of such information.

3. Such witnesses, in testifying, admittedly refreshed their recollection from documents which the trial court held had not been lawfully obtained from the Commissioner of Internal Revenue and which documents the court refused to admit into evidence for that reason. The trial court, nevertheless, erroneously permitted the use of such

documents by the above three witnesses to refresh their recollection and to enable them to testify at the trial.

II.

The said District Court erred in overruling objections of defendants to testimony of witnesses wherein the witness could not designate with which defendant he had the transaction involved, but stated it was one or the other of the defendants.

III.

The said District Court erred in overruling objections of the defendants to admission of testimony in the form of opinions and estimates as to the amount per pound which such witnesses paid in excess of ceiling and as to the number of times that such witnesses paid in excess of ceiling.

IV.

The District Court refused to admit supplemental income tax returns of the individual defendants on the ground that they had not been obtained from the Internal Revenue Department in compliance with the laws and rules and regulations relating to the use of income tax returns as evidence. Such court, nevertheless, erred in refusing to permit defendants' counsel [93] to inquire into the extent to which such returns were used before the Grand Jury in obtaining the indictment after defendants' counsel had made a motion to quash the indictment.

V.

The trial court erred in admitting into evidence defendants' partnership income tax returns which were made

by the defendants under the compulsion of the law and which were used against the defendants in violation of their constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

VI.

The trial court erred in admitting into evidence an accountant's statement prepared under the supervision of defendants' tax attorney and delivered by such attorney to agents of the Department of Internal Revenue, there being no showing that the defendants William Shubin or Frederick Alexander Shubin ever waived the privilege accorded to them under this document by subsection 2 of Section 1881 of the Code of Civil Procedure of the State of California.

VII.

There was no evidence tending to show the existence of a conspiracy other than admissions made by the three defendants to the agents of the Bureau of Internal Revenue in connection with the preparation of supplemental income tax returns, and such admissions are insufficient to prove a conspiracy as they were not made in furtherance of any conspiracy, nor were they made by defendants in the presence of one another.

VIII.

The evidence was insufficient to sustain the verdict and judgment in that there was no proof made of the terms of the regulations of the Office of Price Administration which were alleged to have been violated, and there was no proof of the [94] defendants' knowledge of such terms, and in this connection the court erred in refusing the

defendants' requested instructions to the jury on the issue of knowledge and good faith.

IX.

The District Court erred in refusing the defendants' requested jury instructions Nos. 1, 3, 5, 6, 8, 9, 10, 12, 13, 14 and 15.

X.

The trial court erred in refusing to grant the defendants' motions for judgment of acquittal made at the close of the trial.

XI.

The trial court erred in refusing to grant defendants' motion for a new trial on each of the grounds stated in such motion.

XII.

The penalties imposed by the trial court in the form of sentences and fines are excessive.

Dated: August 28th, 1946.

McLAUGHLIN, McGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants and Appellants [95]

Received copy of the within Statement of Points this 28 day of August, 1946. James M. Carter, U. S. Atty., by U. Allen.

[Endorsed]: Filed Aug. 28, 1946. [96]

[Title of District Court and Cause.]

STIPULATION PERMITTING THE WITHDRAW-
AL AND TRANSMITTAL OF ORIGINAL RE-
PORTER'S TRANSCRIPT TO CLERK OF THE
CIRCUIT COURT OF APPEALS

It Is Hereby Stipulated by and between Honorable James M. Carter, U. S. Attorney, and William Strong, Special Assistant to the U. S. Attorney, attorneys for plaintiff and appellee, and McLaughlin, McGinley & Hanson, attorneys for defendants and appellants, that the original Reporter's Transcript of the proceedings in the trial of the above entitled action which was heretofore furnished for the use of the trial court, may be withdrawn and transmitted to the Clerk of the Circuit Court of Appeals for his use in printing the record on appeal.

September 5

Dated: ~~August 29,~~ 1946.

JAMES M. CARTER

U. S. Attorney

ARTHUR LIVINGSTON

Chief, Criminal Div.

WILLIAM STRONG

Sp. Asst. U. S. Atty.

By William Strong

Attorneys for Pltf. and Appellee

McLAUGHLIN, MCGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defts. and Appellants

It Is So Ordered:

ALBERT M. SAMES

Judge, U. S. District Court

[Endorsed]: Filed Sep. 5, 1946. [97]

[Title of District Court and Cause.]

STIPULATION PERMITTING THE WITHDRAW-
AL AND TRANSMITTAL OF ORIGINAL EX-
HIBITS AS PART OF THE TRANSCRIPT OF
THE RECORD

It Is Hereby Stipulated by and between Honorable James M. Carter, United States Attorney, and William Strong, Special Assistant to the United States Attorney, attorneys for the plaintiff and appellee, and McLaughlin, McGinley & Hanson, attorneys for defendants and appellants, that in lieu of the Clerk of the above entitled court making copies of the exhibits as a part of the record, that the exhibits on file with the Clerk may be withdrawn and transmitted to the Clerk of the Circuit Court of Appeals as a part of the transcript of the record, and that this shall include all exhibits offered and received during the trial of the said case, and also Government's Exhibits Nos. 50, 51, and 52 for Identification. [98]

Dated this 29th day of August, 1946.

JAMES M. CARTER

United States Attorney

ARTHUR LIVINGSTON

Chief, Criminal Division

WILLIAM STRONG

Sp. Asst. U. S. Atty.

By William Strong

Special Assistant to the United States
Attorney

Attorneys for Plaintiff and Appellee

McLAUGHLIN, McGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants and Appellants

It Is So Ordered. September 5, 1946.

ALBERT M. SAMES

Judge, U. S. District Court

[Endorsed]: Filed Sep. 5, 1946. [99]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME OF APPELLANTS FOR FILING TRANSCRIPT OF RECORD AND DOCKETING OF CAUSE

It Is Hereby Stipulated by and between Honorable James M. Carter, United States Attorney, and William Strong, Special Assistant to the United States Attorney, attorneys for the plaintiff and appellee, and McLaughlin, McGinley & Hanson, attorneys for defendants and appellants, that the time for appellants to file the record and docket the cause in the appellate court be and it hereby is extended up to and included October 5, 1946.

September 5

Dated: ~~August 29,~~ 1946.

JAMES M. CARTER

United States Attorney

ARTHUR LIVINGSTON

Chief, Criminal Division

WILLIAM STRONG

Sp. Asst. U. S. Atty.

By William Strong

Special Assistant to U. S. Atty.

Attorneys for Plaintiff and Appellee

McLAUGHLIN, MCGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants and Appellants

It Is So Ordered:

ALBERT M. SAMES

Judge, U. S. District Court

[Endorsed]: Filed Sep. 5, 1946. [100]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 103 inclusive contain full, true and correct copies of Indictment; Motion of Defendants for a Bill of Particulars; Motion of Defendants to Dismiss; Minute Order Entered April 1, 1946; Defendants' Requested Jury Instructions; Minute Order Entered June 21, 1946; Three Verdicts of the Jury; Motion of Defendants for a New Trial; Minute Order Entered July 5, 1946; Judgment and Commitment as to Each of the Defendants; Notice of Appeal; Statement of Points Upon Which Appellant Intends to Rely on Appeal; Stipulation and Order for Transmittal of Reporter's Transcript; Stipulation and Order for Transmittal of Original Exhibits; Stipulation and Order Extending Time to File Record and Docket Appeal and Designation of Record on Appeal which, together with copy of Reporters' Transcript and Original Exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.90 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 16 day of September, A. D. 1946.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke

Chief Deputy Clerk

[Title of District Court and Cause.]

Honorable J. F. T. O'Connor, Judge Presiding

TRANSCRIPT OF PROCEEDINGS OF
JURY TRIAL

Los Angeles, California, Tuesday, June 18, 1946

Appearances:

For the Plaintiff: James M. Carter, United States Attorney; by Norman W. Neukom, Assistant United States Attorney; and William Strong, Special Assistant to the United States Attorney.

For the Defendants: McLaughlin, McGinley & Hanson, by James A. McLaughlin, Esq., 1224 Bank of America Building, 650 South Spring Street, Los Angeles 14, California.

Los Angeles, California, Tuesday, June 18, 1946,
10:00 O'Clock.

The Court: Mr. Cross, call the calendar.

The Clerk: No. 18367 Criminal, United States of America vs. William Shubin, Frederick Alexander Shubin, and Jack L. Kissel, for jury trial.

(A jury and two alternates were duly impaneled and sworn.)

The Court: The jurors who have not been called to serve in this case will be excused until notified by the clerk to appear for further jury service. It is now nine minutes to 12:00 and I feel that little could be accomplished by commencing the case, ladies and gentlemen, and so we will take a recess now until 2:00 o'clock.

I admonish you that you shall not discuss this case among yourselves. You shall not permit anyone to dis-

cuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court.

(Thereupon, at 11:51 o'clock a. m., a recess was taken until 2:00 o'clock p. m.) [2]

Los Angeles, California, Tuesday, June 18, 1946, 2:00 O'Clock.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 18367, United States of America vs. William Shubin and others for further jury trial.

Mr. Strong: Ready for the government.

Mr. McLaughlin: The defendants are ready.

The Court: Stipulate that the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Stipulate that the defendants are in court?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: The issues, ladies and gentlemen, that you are about to try are framed in what we call an indictment and I shall now read to you the indictment which will define these issues.

(Counts 1 and 2 of the indictment read by the court.)

Mr. Neukom: Your Honor, wouldn't a summation of the remaining counts save you a lot of time?

The Court: I am going to take that up now. I have read count 2 to the jury. There are 38 counts remaining. The language in each count is the same general charging language, the only difference being the date and in some

instances the [3] name of the person to whom the sale was made, the particular kinds of meat cuts and the price regulation. So, with the consent of the government and the defendants, instead of reading a repetition of all the language, I shall name the count and just give the items that I have mentioned.

Mr. McLaughlin: We consent to that, your Honor.

Mr. Strong: We consent to that, your Honor, except that there are two different types of violations and the counts are broken up and in count 12, for example, that is of the second type.

The Court: Yes. As I said before, I will call that to the jury's attention as I read these.

Mr. Strong: We consent to that, your Honor.

(The balance of the indictment was summarized by the court.)

The Court: To each of these counts the defendants have pleaded not guilty and that places upon the government the duty of establishing beyond a reasonable doubt all of these allegations that I have read to you.

Are there any comments or any further reading of the indictment requested by either side?

Mr. Neukom: The only one point on that last observation, your Honor, is that before you may find them guilty of any one count, you must find beyond a reasonable doubt. In other words, the government might not elect to prove each and every [4] one of the counts. We might abandon some during the course of the trial. With that clarification, is that not correct?

The Court: Yes, that is correct law. If you abandon any counts, then they are not before the jury.

Mr. Neukom: That was my only point on that.

The Court: Do the defendants have any remarks?

Mr. McLaughlin: No, your Honor.

The Court: Does the government wish to make an opening statement?

Mr. Neukom: Yes, your Honor.

The Court: Proceed. [5]

Opening Statement on Behalf of Plaintiff.

Mr. Strong: Your Honor, ladies and gentlemen of the jury: I am going to speak to you very briefly respecting this case. Primarily, I am going to tell you what we hope to prove and how we are going to go about proving it, so that you will understand what it is that is taking place before your eyes as it takes place. What I tell you about what we intend to prove, of course, you are not to accept as fact at all; it is just an aspiration on my part, and you will be the judges of whether we have proved it or not; you will be the judges of whether the counts which we have alleged in the indictment here have been established by the witnesses, and the other evidence in this case.

You have heard the indictment read. It is quite lengthy, but it really is a very simple indictment and it is a very simple case essentially.

The violations charged in this indictment, as his Honor has told to you, fall roughly into two main groups. We have one count under one statute, which is a conspiracy statute, which charges that these defendants conspired to violate a law of the United States, that is, the Emergency Price Control Act; and that they concocted a scheme whose purpose it was to bring about in the future these various violations.

Now, these defendants are charged in this count with having agreed—and you may find that it is by actual [6] formal agreement or tacit agreement which you can infer from the facts, his Honor will explain to you more fully later when he tells you about the law—and, by the way, anything I say about the law, of course, you will listen to his Honor's statement of the law rather than to mine. But his Honor will tell you about the law, later on, of conspiracy and how these agreements might be found to exist. But the sum and substance of the agreement was all with relation to the Emergency Price Control Act.

These people, as we will show you, these defendants, were engaged in the business of selling meats as wholesalers of meat and they sold meat to retailers who would purchase the meat from the defendants and then re-sell them to the consumers, housewives, to the general public, and in selling meat to the retailers the defendants, under the Emergency Price Control Act, were permitted to charge certain maximum prices; they could not go above those prices.

And the first count here, the conspiracy count, is in general and in substance to the effect that the defendants agreed among themselves that they would not sell any meat at the maximum prices, but that every time they sold meat they were going to get more than the maximum price for it; and that they would actually make such sales wherever possible and get the higher than the maximum prices.

Further, that they would make entries on their books with [7] reference to these sales, which entries are, under the law, required to be truthful entries, but the indict-

ment charges that it was part of the scheme that the entries would not be truthful entries; that they would be false entries in effect to conceal the fact that they had sold meat to a retailer at higher than the maximum price; and that they would engage in various other activities with reference to the books which they kept, with reference to the records, with reference to making loans and transfers and exchanging of checks, and various other types of actions for the purpose of concealing the evidence that they are charging more than the maximum price.

You will see this developed more fully as our witnesses come on, and I just want to tell you briefly what the substance of the proof will be, so that when it comes in you will recognize its proper place in the picture and what it has to do with the case.

And in that count there are set forth, also, of course, the various acts which were, we believe, committed in the consummation and in the carrying out of this conspiracy agreement. That is the sum and substance of that first count—an agreement, a scheme to do the things with reference to the sale of meats which we say are in violation of the Emergency Price Control, to sell over-ceiling, to conceal it in these various ways, and we put it in technical language [8] that the burden is that they would conceal it in these various ways so that the Emergency Price Control people, the OPA records, would not disclose what the true situation was and the sale.

Then the second count, which runs all the way from Count 2 as far back as the indictment goes, to Count 40, relates to their actually doing these things; and each time that it is done, it is a separate violation under the laws, as his Honor will explain to you. And those are

broken up, generally, into two types of activities: One type is the sale of meat to retailers at a price in excess of the ceiling price; and the second type of activity is the making or causing somebody else on their behalf to make an entry on their bonds which is false, which does not reveal the true situation as it existed at that time.

Now, we have a number of witnesses who are engaged in the retail meat business, who purchased meats from the defendants and who were required to pay over and above the ceiling price, as they will testify; and they will testify as to specific items, specific sales which are covered by definite numbered invoices and which relate to the individual accounts; and we have witnesses who will testify as to various other types of violations as set forth in the indictment. These, you might call, are the witnesses who were actually staying over and doing the various other things which were not [9] permitted, as his Honor will explain, in the law.

Besides that, we have testimony consisting of various books and entries, which will be brought out more fully later, which again will tend to prove, we believe, that these very acts which we say were committed were actually committed.

And last, but not least, we have written confessions, admissions signed by the defendants—each of the defendants signed one—which we will introduce into evidence, in which they describe in detail just what they were doing and how they were doing it, how they sold, what they sold, and how they handled their books, so that nobody who would read them would know what was going on; in other words, how they made false entries and what their purpose was.

The Court: Do the defendants wish at this time to make a statement, or to reserve their statement until the Government has put on its case?

Mr. McLaughlin: I was just going to ask, your Honor, if I could reserve my statement until the Government had completed. [10]

The Court: That will be satisfactory to the court. The Government will call its first witness.

Mr. Neukom: I will call the representative of the Bank of America, the Bell branch.

JOHN R. HAMILTON, JR.,

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: John R. Hamilton, Jr.

The Clerk: Take the stand, Mr. Hamilton.

Direct Examination

By Mr. Neukom:

Q. Mr. Hamilton, you have been subpoenaed?

A. I have.

Q. And you were subpoenaed to bring with you records pertaining to the bank account of one—the name, please?

A. William A. Shubin.

Q. Were you requested to bring in more than one bank account? A. All bank accounts.

Q. All bank accounts. I see.

A. All bank accounts at our branch.

Q. And you brought those records with you?

The Court: You had better fix his position first, counsel. [11]

Mr. Neukom: Yes, your Honor.

(Testimony of John R. Hamiton, Jr.)

Q. What is your position with the bank?

A. Chief clerk.

Q. Of the Bell branch?

A. Of the Bell branch of the Bank of America.

Q. And you brought with you records of the bank pertaining to W. A. and J. T. or Julia T. Shubin. Is that correct?

A. Yes.

Q. The larger sheets that you have given to me?

A. Yes.

Q. Are they extra copies or copies you have compared with the actual bank record?

A. They are certified copies. I certified them myself.

Q. You compared them with the originals?

A. Yes.

Q. Rather than making a photostat?

A. Yes.

Q. And to your best knowledge and belief do the entries that appear upon these two cards, one being card 438 William A. or Julia T. Shubin, do the entries on there reflect the true status of the account of the people as of the periods indicated on the card?

A. They do. [12]

Q. Is that correct?

A. Yes.

Mr. Neukom: I would like to offer in evidence the first card unless counsel has an objection. I will have it identified.

Mr. McLaughlin: We make no objection to the foundation or copies, but when they are offered in evidence, I wish to interpose an objection.

The Clerk: Government's No. 1 for identification.

(The card referred to was marked Government's Exhibit No. 1 for identification.)

(Testimony of John R. Hamiton, Jr.)

Mr. Neukom: I appreciate your Honor fully knows that we should have brought the originals on these.

The Court: Counsel hasn't made any objection to that foundation, counsel.

Mr. Neukom: Very well. I would like to offer the second card on W. A. or J. T. Shubin, No. 2179.

The Court: Now, are you marking that for identification or offering it in evidence?

Mr. Neukom: For identification, your Honor.

The Court: All right.

The Clerk: Government's Exhibit No. 2 for identification.

(The card referred to was marked Government's Exhibit No. 2 for identification.) [13]

Mr. Neukom: And it is understood on that that the copy is not objected to?

Mr. McLaughlin: That is correct.

Q. By Mr. Neukom: Now, have you also brought with you records pertaining to a certain cashier's check, item of the Bank of America, being check dated February 4, 1944, in the amount of \$5,000? You have brought the original of that check? (Handing document.)

A. That is the original.

Mr. Neukom: And in lieu of the original we are going to offer the photostatic copy, but I would like to have this identified by the witness so that he may retain the original check.

Mr. McLaughlin: That is satisfactory, Mr. Neukom.

Mr. Neukom: At this time I am going to offer for identification the photostatic copy of the cashier's check bearing No. 3650267.

(Testimony of John R. Hamiton, Jr.)

The Clerk: Government's Exhibit No. 3 for identification.

(The check referred to was marked Governments Exhibit No. 3 for identification.)

Q. By Mr. Neukom: And do you have with you the application for that photostatic check?

A. I have.

Q. The original? [14] A. The original.

Q. Apparently bearing signatures of Emil J. Dvorak?

A. That is right.

Q. And bearing date of February 4, 1944?

A. That is right.

Mr. Neukom: And we are going to have identified the application of the check using the photostat in lieu of the original.

The Clerk: Government's Exhibit 4 for identification.

The Court: What is an application for a check?

Mr. Neukom: Application for a cashier's check.

The Court: That is different?

Mr. Neukom: Did I say for a check? I meant to say for a cashier's check.

The Court: All right.

Mr. Neukom: Or whatever it reads on its face, you Honor.

The Court: All right.

Q. By Mr. Neukom: Referring to your original records, and we will compare here with government's

(Testimony of John R. Hamiton, Jr.)

Exhibit 4 for identification, which is termed "Application for money order, cashier's check or draft," can you look at the original of that document and state to me what check was applied for by that application which apparently bears the signature of one Emil J. Dvorak? Is there any way of knowing? [15]

A. Well, except by the numbers, no.

Q. By the numbers, and what check by the number does the record show that that was an application for?

A. It shows it was an application for a cashier's check.

Q. And is there any way of knowing the numerals that were assigned to it?

A. Yes. They appear on the application and they also appear on the check.

Q. And will you call those to our attention?

A. 365027. That is on the check. On the application we make a practice of using the last three or four numbers and the number is 267 on the application.

Q. Is it your testimony that it was for the same check as Government's Exhibit 3 for identification, the photo-stat?

A. It is the same.

Mr. Neukom: That is all.

Mr. McLaughlin: No cross examination.

Mr. Neukom: Thank you, Mr. Hamilton.

(Witness excused.)

Mr. Neukom: I will call Mr. Dvorak.

EMIL J. DVORAK,

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please. [16]

The Witness: Emil J. Dvorak.

Direct Examination

By Mr. Neukom:

Q. Mr. Dvorak, where do you live?

A. In Bell.

Q. Here near Los Angeles? A. Yes.

Q. Are you acquainted with the three defendants in this case? A. Yes, sir.

Q. And have you seen them upon many occasions?

A. Lots of times.

Q. And what business are you in now?

A. In the retail meat business.

Q. Starting in the latter part of November or some time in November of 1942, were you in the retail meat business? A. Yes, sir.

Q. And where were you conducting your shop?

A. In Maywood.

Q. More than one shop or just the one?

A. Just the one.

Q. And did you at that time, or prior to that time had you met the defendant Frederick Shubin? Before that had you met Frederick Shubin?

A. Yes, sir. [17]

Q. And had you met William Shubin?

A. Yes, sir.

Q. And had you met Jack Kissel?

A. Yes, sir.

(Testimony of Emil J. Dvorak)

Q. Had you ever had occasion to go to their plant if they had a meat plant or a jobber's or supply place in Los Angeles or in the vicinity of Los Angeles?

A. Yes.

Q. And where was that? A. In Vernon.

Q. Do you recall the address?

A. 3301, I think. I am not positive.

Q. And that is in a meat packing plant locality, is that correct? A. Yes, sir.

Q. And were they doing business under the name of Shubin or Kissel, or under what name?

A. Vernon Hotel and Restaurant Supply Company.

Q. Now, referring to November of 1942, was that about the first time you bought meat from the defendants operating under the name of the Vernon Hotel and Restaurant Supply Company?

A. I presume it was about that time.

Q. And when you bought meat at their plant what was your practice, to go to their plant? [18]

A. I picked up my own merchandise.

Q. You would go in your own truck?

A. Yes, sir.

Q. And did you have a conversation with any one of these defendants around about that time about buying meat from them? A. Well—

Mr. McLaughlin: That can be answered yes or no, I submit.

The Witness: Yes.

Q. By Mr. Neukom: And to whom do you recall talking to? A. To Bill.

Q. You mean by "Bill," William Shubin?

A. Yes, William Shubin.

(Testimony of Emil J. Dvorak)

Q. And William Shubin is which one of the defendants? A. The first one on my left.

Q. The gentleman with the gray suit nearest the front row? A. Yes.

Q. Do you recall what, if anything, you said to Bill Shubin.

The Court: Fix the time and place and who was present, counsel.

Mr. Neukom: Very well. [19]

Mr. McLaughlin: I was going to ask that, your Honor.

Q. By Mr. Neukom: To the best of your recollection when did that take place?

A. Well, dates are pretty hard—

The Court: It is not necessary to give the exact date, just the approximate date, as near as you can fix it.

The Witness: It is hard to say about any dates because I just don't recall.

The Court: What year was it?

The Witness: 1942.

The Court: What month was it?

The Witness: Well, you understand I bought from Bill Shubin when he was in partners with another fellow and this partnership that exists today between them kept going on from there and I started buying meat from Bill and Jack Johnson in 1941 and I just continued with them from then on even though it did change into the partnership it is today.

Q. By Mr. Neukom: Well, just for the purpose of withdrawing all that and first calling your attention to the time when you bought meat from Bill Shubin or the Vernon Hotel and Restaurant Supply Company, did you

(Testimony of Emil J. Dvorak)

receive, when you did buy meats from Mr. Shubin, invoices? A. Yes, sir.

Q. Now, commencing with the latter part of the year 1942 and thereafter, were you ever present at the plant when [20] you had purchased meat and received invoices?

A. Yes.

Mr. McLaughlin: Is the question finished?

Mr. Neukom: I will continue on.

Q. —and received an invoice in which you paid for the invoice? A. Yes.

Mr. McLaughlin: Just a moment. I object to that question as being leading and suggestive, your Honor.

The Court: Well, it is probably subject to that objection. You might make the question a little more general. Ask him what happened, what transpired. That is what counsel is objecting to and the objection is proper.

Mr. Neukom: Very well, your Honor.

Q. I show you an invoice which appears to bear date of 1/4/44, an invoice of the Vernon Hotel and Restaurant Supply Company bearing the serial number in red of 39251 and apparently indicating the sale to Emil Dvorak of certain merchandise. Do you recall ever having seen that invoice before? A. Yes.

Q. Do you recall having on or about that date received from the Vernon Hotel and Restaurant Supply Company merchandise as is indicated on the invoice?

A. Yes.

Q. You will note that under the item there appears [21] S. C. Do you know what that was?

A. Yes, short cut pork loins.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: Just a moment—well, that is all right. I didn't know what he was going to testify to. It is harmless.

Q. By Mr. Neukom: Very well. And it indicates weight of 126 pounds and a price of 26 cents a pound?

A. Yes, sir.

Q. Do you have any independent recollection as to whether or not you actually paid 26 cents a pound for the meat indicated here or whether you paid an additional sum?

Mr. McLaughlin: Now, your Honor, we object to that as being leading and suggestive. There has been no transaction fixed as to times, places or parties present. If this witness is going to testify that he did pay more, I think we are entitled to know the other parties to the transaction.

The Court: That is correct.

Mr. Neukom: Very well.

Q. By Mr. Neukom: Starting in the year 1942, the latter part of the year 1942, without any recollection to any specific invoice, did you have a conversation with William Shubin at his plant where there was discussed the subject matter of you paying over the ceiling price for meat? A. Yes.

Q. And who was present? [22]

A. Just Bill and I.

Q. And it took place at their plant on East Vernon. Is that correct?

A. Well, one time he came down to my place.

Q. Well, which one are you speaking about now?

A. Well, the one I am referring to is the time that he was down to my place.

(Testimony of Emil J. Dvorak)

Q. And when was that, to the best of your recollection?

A. Well, I would say it was that or prior to that date?

The Court: What date?

The Witness: In November.

Mr. Neukom: I said in the latter part of 1942.

The Court: All right.

Q. By Mr. Neukom: He came to your plant. Do you recall about when that was, Mr. Dvorak?

A. Well, it is pretty vague in my mind right at this time because that is a long time ago.

Q. What is your best recollection, was it before or after he was no longer associated with Mr. Johnson?

A. Well, it was after their new partnership was formed.

Mr. McLaughlin: I object to that on the ground that it is a conclusion and I move to strike it. [23]

The Court: Yes. There is no foundation for that. Strike it out unless you can develop it by the witness.

Mr. Neukom: I think we will be able to tie it up, your Honor.

The Court: All right.

Q. By Mr. Neukom: What is your best recollection as to when the new partnership was formed that you spoke of?

Mr. McLaughlin: We will object to that on the ground that it is a conclusion as to when a new partnership was formed. If he wants to testify when they started doing business under another name, that is something that anyone would know.

The Court: Well, ask him that question.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: What is your best recollection as to when the new partnership was formed?

The Court: No, because that is a legal conclusion. He wouldn't know whether it was a partnership or not. There is no foundation laid, counsel.

Mr. Neukom: Oh, I thought it was both the same, as to names.

The Court: No, I think not.

Q. By Mr. Neukom: Very well. When is your best recollection?

The Court: When they started to do business with the new name. [24]

The Witness: Well, it was in 1942.

The Court: What part of the year, the latter part or the first part?

The Witness: Well, I would say it was the latter part.

The Court: All right, go ahead.

Q. By Mr. Neukom: And after the formation of that new partnership, did you have a conversation with Bill Shubin?

Mr. McLaughlin: Well, now, Mr. Neukom, I don't want to be too technical. I think it should be after the new name because I don't want this witness to testify as to when the new partnership was created. We are going to stipulate that.

Mr. Neukom: Well, I am willing, if you feel so advised, that the date could be clarified at the present time.

Mr. McLaughlin: I think it will help in the confusion.

Mr. Neukom: Very well.

Mr. McLaughlin: November 14, 1942.

(Testimony of Emil J. Dvorak)

Mr. Neukom: All right. We have the date.

The Court: And what is the name, Mr. McLaughlin?

Mr. McLaughlin: The Vernon Hotel, Restaurant and Supply Company.

The Court: Have you any objection to naming the partners?

Mr. McLaughlin: No, your Honor, the three defendants.

The Court: All right. Proceed. [25]

Q. By Mr. Neukom: Prior to that time you had also done business with Mr. Shubin and another man, Mr. Johnson, with whom we are not concerned. Is that correct? A. Yes.

Q. And after about November 12, 1942, do you recall having had a conversation with Mr. Bill Shubin with regard to your purchasing meat at a price over and above the ceiling? Just answer that yes or no.

A. Yes.

Q. And do you recall where the first one took place?

A. In my shop.

Q. And your shop was located where?

A. In Maywood.

Q. Maywood, California? A. Yes.

Q. And do you recall about when the date was?

A. The exact date, no, sir.

Q. It was after November 12, 1942?

A. Yes.

Q. To the best of your recollection was it in 1942?

A. Well, it might have been the first part of 1943 because there was a period in there that I did not purchase any meat from them.

(Testimony of Emil J. Dvorak)

Q. Who was present to your best recollection?

A. Just the two of us. [26]

Q. And what was said, if you recall, by Mr. Shubin?

A. Well, I wasn't buying any meat from them because—

The Court: No, that isn't the question. Just listen to the question.

Q. By Mr. Neukom: Just what was said.

The Court: You don't have to use the exact language. Just give us the substance of it. Very few people can remember exact language.

The Witness: Well, he stated that if you want to stay in business you got to play ball.

The Court: What did you say?

The Witness: I didn't say anything right then. I was undecided.

The Court: No. That may go out. Not any of your own mental activities, just what was said. What did he say? Did he say anything further?

The Witness: Well, that was all that was said.

Q. By Mr. Neukom: And after that did you see him again?

A. Later on I went to the shop to their place of business myself.

Q. Did you have another talk with Mr. Shubin?

A. Well, no, not concerning buying any meat. They was just glad to see me when I came down there. [27]

Q. And when was that to your best recollection that you went down there to buy meat?

A. Well, it might have been the latter part of 1942 in December some time, or the first part of 1943.

(Testimony of Emil J. Dvorak)

Q. And did you buy meat?

A. Yes, sir, I did.

Q. And commencing when you started to buy meat either in the latter part of 1942 or the early part of 1943, did you receive invoices for the meat that you purchased?

A. Yes, sir. [28]

Q. Do you have with you all of the invoices respecting all of the meat that you have ever purchased from the Vernon Hotel and Restaurant Supply Company?

A. You mean do I have them in my place of business?

Q. Yes. A. Yes, sir.

Q. Do you recall whether or not when you purchased the first meat that you bought from Mr. Shubin after he had been over to your shop you paid any sum in addition to the invoice of the total amount of meat that you picked up?

Mr. McLaughlin: Now, just a minute, your Honor. I object to that on the ground that it is leading and suggestive, and calls for a conclusion of the witness and is not the proper way. In other words, he might testify he paid Mr. Shubin when in fact he may have talked to someone else, and I submit these places and parties present should be fixed.

The Court: Yes. I would fix the time and place. That is always proper, so the defense has an opportunity to meet it, Mr. Neukom.

Mr. Neukom: Your Honor, we have not brought every single invoice in the case here.

The Court: That is not necessary.

Mr. Neukom: And I had none back that early, but I will proceed with the one that I was last talking to the witness about. [29]

(Testimony of Emil J. Dvorak)

The Court: Mark it first for identification and then we will have the record clear on what exhibits we are referring to.

Mr. Neukom: All right. Can all which I have in my hand, which have been marked count numbers in red—we have used a symbol for count numbers—bear the subsequent identification? I tried to keep them clear on the count angle. That is why we put a red symbol on there.

Mr. McLaughlin: Mr. Neukom, are those counts 2 to 9?

Mr. Neukom: There is some variation in the counts.

Mr. McLaughlin: That is all right.

Q. By Mr. Neukom: Now I am showing you, Mr. Dvorak—

The Court: Listen, we haven't made our record straight yet.

Mr. Neukom: Oh, I beg your pardon.

The Clerk: Those will be Exhibits 5 to 18, inclusive, for identification.

(The documents referred to were marked as Government's Exhibits Nos. 5 to 18, inclusive, for identification.)

The Court: Now you are referring to identification number what, Mr. Neukom?

Mr. Neukom: No. 5, your Honor.

The Court: Has the defense counsel seen it?

Mr. Neukom: Yes, your Honor. [30]

Mr. McLaughlin: Your Honor, I have seen one, and it is a sample, and if you just designate the numbers, I have a chart here which will help me on that.

Mr. Neukom: I will each time refer to what I assume the count is and then you can tally afterwards.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: Thank you.

Mr. Neukom: Count No. 2 is Government's 5 for identification.

The Court: All right.

Q. By Mr. Neukom: Now, Mr. Dvorak, you notice that on this statement here in your name, Emil Dvorak, there is a total purchase price of \$74.08, is that correct?

A. Yes, sir.

Mr. McLaughlin: That is objected to on the ground the document speaks for itself, Mr. Neukom. We do not question it, but I do not want the witness interpreting it wrongly.

Mr. Neukom: All right; I will reframe it. I will offer this into evidence, your Honor, in just a moment. Allow me to lay a further foundation.

Q. From whom did you secure Government's Exhibit No. 5 for identification?

A. From who did I get that invoice?

Q. Yes; from what concern?

A. From the Vernon Hotel and Restaurant Supply Company. [31]

Q. And was that contemporaneous with or at the time you made the purchase of the items of meat that are indicated on there? A. Yes.

Q. And was that handed to you by—

The Court: Who handed it to you?

Q. By Mr. Neukom: Who handed it to you?

A. Either the cashier or bookkeeper.

Q. And at the time this was handed to you was one or any of the defendants present at the plant and in your immediate visibility at the time this transaction was had?

A. Well, most generally Bill or Jack were.

(Testimony of Emil J. Dvorak)

The Court: No, no. That may go out. Listen, Mr. Witness, to the question.

The Witness: Well, it is hard for me—

The Court: Wait a minute. Repeat the question.

(Question read by the reporter.)

A. Yes.

Q. By Mr. Neukom: Whom, to your best recollection, was present when this particular invoice was received, of the defendants?

A. Well, to say truthfully, I just couldn't say whether Bill or Jack was there. They could have both been there or one or the other could have been there, because they was most generally there when I was there. [32]

The Court: Now, "most generally" will be stricken out. The balance may remain as going to the weight of the testimony.

Mr. Neukom: Very well, your Honor. Now I am offering into evidence Government's Exhibit No. 5 for identification as Government's Exhibit No. 5 in evidence.

Mr. McLaughlin: May I ask, Mr. Neukom, is that the copy that Mr. Dvorak produced or is that one—

Mr. Neukom: That is the copy that Mr. Dvorak produced.

Mr. McLaughlin: Yes, I see. Well, for the time being, the only objection we have is that it is immaterial, and I appreciate that the Government has to prove its case or endeavor to do so bit by bit.

The Court: That is right.

Mr. Neukom: May it be received, your Honor?

The Court: In evidence. Pass it to the jury.

Mr. Neukom: Government's Exhibit No. 5.

The Clerk: In evidence.

(Testimony of Emil J. Dvorak)

(The document heretofore marked as Government's Exhibit No. 5, was received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 5]

Customer's Invoice

VERNON HOTEL & RESTAURANT SUPPLY CO.
WHOLESALE
QUALITY MEATS

Phones

LU 3322 -- LU 2940

3301 E. Vernon Ave.

Vernon, Calif., 1-4 1944

Sold to Emil Devorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
630		5.0 S/C	126	26	32 76
250		20 N/Y	125	25	31 25
66		20 Smoke R/E	33	30 1/2	10 07

946

Total

74 08

[Stamped]: Paid B

39251

Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 5 Identification. Date 6/18/46. No. 5 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Mr. Neukom: Now, I at this time, and if it is agreeable with counsel for the defense, it is possible that we were going to enter into a stipulation. If the stipulation is not entered into, no bad faith is, of course, charged. But the Government will be in a position in due time to prove what was the ceiling price for certain types of commodities as of any [33] given date. I believe counsel has tentatively understood the ceiling price would be the figure that is indicated under the price item.

Mr. McLaughlin: Do you desire me to stipulate that the price item shown on the invoice which is No. 5 is the ceiling price?

Mr. Neukom: That is correct.

Mr. McLaughlin: I will so stipulate.

Mr. Neukom: Very well.

The Court: Now, for the record, what is the price?

Mr. Neukom: It varies. There are three different items here, your Honor, and I am going to allow the witness to interpret them, because I assume they are terms of the trade.

Mr. McLaughlin: Well, Mr. Neukom, may I see that again, then? I did not know that you were going to break it down.

Mr. Neukom: Well, I am not an expert. I don't know what "S. C." means.

The Court: Otherwise the meaning is for the jury.

Mr. Neukom: "Shortcuts," I assume.

Mr. McLaughlin: I assume that you are going to ask him what the abbreviations are for the types of meat?

Mr. Neukom: That is right.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: I have no objection to that, your Honor.

Mr. Neukom: Very well. [34]

The Court: Proceed.

Mr. Neukom: The type of meat or item.

Q. What does the "S. C." mean?

A. Shortcut pork loin.

Q. And the weight of the particular amount of pork loin you bought on that day? A. 126 pounds.

Q. And the price per pound as per invoice was 26 cents? A. 26 cents.

Q. And the total amount for the shortcut was \$32.76, is that correct? A. Yes.

Q. Do you have a recollection of paying any sum over and above that sum of \$32.76 at the time you received this particular merchandise—yes or no?

A. Yes.

Mr. McLaughlin: That is objected to as leading and suggestive.

The Court: Yes, counsel, I think it is. I think the proper way to ask that question is to state just what monetary consideration, if any, passed between the parties.

Mr. McLaughlin: And who the parties were.

Mr. Neukom: Very well.

Q. Did you pay to any party any additional sum for the purchase of meat reflected by this invoice? [35]

The Court: Yes or no?

Mr. Neukom: Yes or no? A. Yes, sir.

Q. And to whom, to your best recollection, did you pay it? A. To Bill or Jack.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: I move to strike that, your Honor, if he is not able to fix the party.

The Court: Counsel, that goes to the weight of the testimony. It is not as convincingly clear as if he could name specifically, but a person may answer in that way and it goes to the weight of his testimony, not to the admissibility.

All right; proceed.

Q. By Mr. Neukom: And you will note the total of this invoice is \$74.08? A. Yes, sir.

Q. Do you recall to whom, if anybody, you paid that amount of money? A. To the girl.

Q. And did you pay her by check or how?

A. Well, I most generally paid cash or checks that were taken in at my shop.

Q. In other words, you—

A. It was always a cash transaction. [36]

Q. Now, do you have a recollection of how much more a pound above 26 cents a pound you paid at that particular instance for the shortcuts that are reflected in Government's Exhibit 5 in evidence?

Mr. McLaughlin: Your Honor, I submit that that would be a conclusion of the witness and it would be circumventing the rule that a party has to describe what was said and done and the court and the jury can determine how much extra was paid from what was said and done by the parties. So far there has not been one bit of testimony as to what either of the Shubins said or what he said to the Shubins when the money was passed.

Mr. Neukom: May I be heard, your Honor?

(Testimony of Emil J. Dvorak)

We have an instance here in which—and it will be the Government's proof—that over a period of two years or so this witness has paid a price over and above the invoice price. It is obvious that no human brain could remember exactly how much they may have paid on each broken-down item. But if this witness can remember and state that over this period of time, in each and every instance, or if in virtually every instance, he paid so much more a pound for pork loin, so much more a pound for beef, so much more a pound for bacon, so much more a pound for ham, as it may vary, it goes entirely to the weight of his testimony rather than to the admissibility. [37]

It is obvious, and I think it will appear obvious to your Honor, as this case is heard, that these people were not dealing under a circumstance where they were publicizing their rates from day to day; and we propose to show in this case that it was always in cash that the over-ceiling price was paid for. In almost every instance the invoice price was paid for by a check, but that a cash transaction took place, and I submit that the matter is entirely to the weight rather than to the admissibility.

The Court: Well, counsel, the matter is very clear and the testimony can be invoked. Ask the witness what transpired on this occasion and with whom and what he paid.

Now, that is very clear, and he gives his best recollection of it.

Mr. Neukom: Very well.

The Court: That is all. That is very simple, and that is all counsel is asking that he do. All right.

(Testimony of Emil J. Dvorak)

Mr. Neukom: I think it has been testified that his best recollection was that in this instance it was William Shubin.

The Court: Yes, or—

Mr. McLaughlin: Or Frederick.

The Witness: No, Jack.

Mr. Neukom: Or Jack Kissel. Wasn't that correct?

The Witness: Bill or Jack. [38]

The Court: Bill or Jack?

The Witness: Bill or Jack.

The Court: Jack Kissel. Very well. Now, proceed.

Mr. Neukom: All right.

Q. Now, do you recall at the date in question, January 14, 1944, you having paid any sums of money to either William Shubin or Jack Kissel in addition to the invoice price of \$74.08—yes or no? A. Yes.

Q. Now, can you recall specifically exactly how much money you paid? A. No.

Q. Are you in any position to recall, to your best recollection, how much more per pound, if any, you paid for each of the respective items reflected on Government's Exhibit No. 5 in evidence?

Mr. McLaughlin: Objected to as calling for a conclusion. If he does not know how much he paid totally, he certainly could not testify how much more per pound he paid, either.

The Court: Oh, no, counsel; that does not follow. That is a matter of mathematics. Overruled.

Q. By Mr. Neukom: Do you know how much, if any, you paid per pound more for the shortcuts on the date in question?

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: The same objection, your Honor.
[39]

The Court: Yes; the same objection and the same ruling.

Mr. Neukom: The best of your recollection?

A. Well, it would be very hard for me to just say exactly how much I paid over ceiling on that one particular date, as the price varied.

Q. What is your best recollection?

Mr. McLaughlin: Your Honor, I think he has asked that and he answered it.

The Court: No. He is entitled to answer it fully, if he can.

A. Well, in 1944 I would say I was paying five cents a pound over ceiling for shortcut pork loins.

Q. By Mr. Neukom: Now, for the New York; is that the next item?

A. Yes; three cents over ceiling.

Q. And for the—what is the third item?

A. The smoked boned ready to eat ham, or smoked hams, ready to eat.

Q. Do you recall how much more per pound, if any, you were paying on that date?

A. Well, I paid over, but to tell you exactly how much I paid for that, I just can't remember.

Q. What is your best recollection?

A. Well—

Mr. McLaughlin: The same objection. [40]

The Court: Yes; the same ruling.

A. The prices varied, as I said before, and in the length of time that I done business with him it is pretty

(Testimony of Emil J. Dvorak)

hard for me to remember, as I didn't keep track of anything.

Q. By Mr. Neukom: Well, what is your recollection?

A. Well, I would say I paid about 8 cents at that time.

Mr. McLaughlin: Your Honor, I move to strike the answer on the ground it is a speculation or a guess. He said, "I would say I did," and he has already said he had no recollection.

The Witness: Of the exact amount, no.

The Court: Oh, no. That just goes to the weight of the testimony, counsel.

Mr. Neukom: Just wait for his Honor.

The Court: Of course, it is not as satisfactory as an exact amount, but a witness may testify to that extent. Proceed.

Q. By Mr. Neukom: Now, the monies that you have testified to here, your best recollection that you paid over the ceiling, in what manner did you pay them to either Jack Kissel or William Shubin as you have testified?

A. I always paid them cash.

Q. Will you relate, to your best recollection, what procedure was followed there at the plant? [41]

Mr. McLaughlin: Well, now, wait. Is this referring to this particular invoice?

Mr. Neukom: Referring to this particular one.

Mr. McLaughlin: And not to other transactions?

The Court: Admitted as to this particular invoice.

Mr. McLaughlin: All right.

A. Well, I would pay the girl the amount there showed, and then either Jack or Bill would figure up how much over ceiling and I would give them the extra cash.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: Did they give you a receipt for that extra cash? A. No receipt.

Mr. McLaughlin: Your Honor, I move to strike the part that Bill or Jack would figure up what I owed them over ceiling, as a conclusion of law and not testimony as to a conversation.

Mr. Neukom: I will reframe it, your Honor.

Q. What did Bill or Jack do, to your best recollection, towards figuring it up? What did you see them do?

A. Well, they would add it up on a comptometer—I think that is what it was.

Q. Was it a mechanical device?

A. Yes; adding machine.

Q. Did they show you some figure? A. No.
[42]

Q. How did you know what figure, if any, was to be paid?

A. Well, at that time I knew how much I was paying and I naturally figured whether they were over-charging me more than they should or not.

Q. And did you pay a sum in addition to the invoice?

A. Yes.

Mr. Neukom: May this go in evidence now?

The Clerk: It is in evidence.

Mr. Neukom: It is in evidence.

Q. I show you Government's Exhibit No. 3.

The Court: Pass the exhibit that has just been entered in evidence to the jury so it can keep track of the trial and they are not confused.

Mr. Neukom: Very well, your Honor.

(Testimony of Emil J. Dvorak)

Q. I show you Government's Exhibit No. 4, first, a photostatic copy.

You have seen the original of that, that I asked the banker about who was on the stand just before you, did you not? A. Yes, sir.

Q. And what purports to be the signature of Emil J. Dvorak, is that your signature? A. Yes, sir.

Q. Before executing this little instrument did you have [43] a conversation with Mr. William Shubin?

A. Yes, sir.

Q. And this instrument bears date of February 4, 1944. Did you have this conversation with Mr. Shubin on that date or shortly before that?

A. Possibly shortly before.

Q. Do you recall where that took place?

A. Down to their place of business.

Q. Down where?

A. Down at the Vernon Hotel and Restaurant Supply Company.

Q. His place of business. And do you recall what Mr. William Shubin said to you? First, who was present? A. Bill and myself.

Q. Do you recall what Mr. William Shubin said to you, if anything? A. In regards to the check?

Q. In regard to this transaction.

A. Why, he wanted to borrow \$5,000 from me.

Q. And what did you say, as nearly as you can recall?

A. Well, at first he asked me if I had—how much money I had in my account. And then I told him. I suppose I told him exactly how much I had. I don't

(Testimony of Emil J. Dvorak)

remember at this time how much I had then, but I had enough to cover the amount that I loaned him. [44]

Mr. Neukom: For the purpose of the record, this is in support of Count 12, this item or transaction.

Q. What did he tell you, if anything—

Mr. McLaughlin: Just a minute. If your Honor please, counsel earmarks it as Count 12. I want to make an objection on the count, that the count does not state any facts sufficient to constitute a cause of action and it is immaterial and not probative of any issues alleged in the indictment. And I would like to be heard on that. I do not believe that there is any objection to having the argument before the jury, but I want to leave that to your Honor's discretion. It involves the terminology of these regulations.

The Court: I think not. You may proceed to make your objection in the record, Mr. McLaughlin.

Mr. Neukom: Your Honor, on any reply may Mr. Strong, who is more familiar with this case, make the reply on the Government's behalf?

The Court: All right.

Mr. McLaughlin: Your Honor, Count 12 alleges that there is a false entry made in the general ledger of the Vernon Hotel and Restaurant Supply Company, showing repayment of a loan of \$5,000 made by Mr. Dvorak. And then it alleges that it violated regulations, and it apparently means three regulations, 148, 169, and 239. And the theory of the Government apparently is that there was some violation of the [45] regulations, assuming that there was a false entry made in the ledger.

(Testimony of Emil J. Dvorak)

We do not concede that there was at all, but we want to cut down the issues in this case a little bit, and we will assume for the moment that that entry was false.

There is nothing in the regulations which relates to the entries that are made in the general ledger or the journal at all. I will refer to the language in each one of these regulations. Regulation 148, which is the regulation relating to pork cuts, contains a provision in Section 1364.27, and that is on page 5 of the Regulation, and here is all it requires. It says:

“Records and reports. (a) Every person who sells, transfers or delivers, and every person in the course of trade or business who buys, receives or acquires any dressed hogs or wholesale pork cuts shall make and/or preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale, transfer, delivery, purchase, receipt, acquisition or other such transaction, showing:

“(1) The date thereof.

“(2) The names and addresses of the parties [46] taking part in the transaction, such as the buyer and seller.

“(3) The description, quantity and weight of all wholesale pork cuts sold, transferred, delivered, purchased, received or acquired, specifically showing:

“(i) The descriptive name of the wholesale pork cut, including the grade of sliced bacon.

(Testimony of Emil J. Dvorak)

“(ii) The weight range or ranges of dressed hogs and/or wholesale pork cuts as named and defined in this regulation.

“(iii) The number of pieces in each weight range of any items for which ranges are specified, except spareribs and Boston butts.

“(iv) The total weights of all items in each specified weight range.

“(4) The price charged, received or paid therefor.”

Your Honor will note that there isn't a thing in that regulation which relates to what entries you may have in your general ledger regarding loans or repayment of loans at all. It is all tied down to data that you must keep regarding any sale that you make of the commodity that is under the price [47] regulation.

And, without reading the other provisions of these other regulations, I will refer to the section of them and I will ask counsel to show me wherein there is any language that says that it violates any regulation here if you show you made a loan, or if you show you borrowed money, even assuming it is a false record.

The section in Regulation 169 which is involved is Section 1364.407, again entitled “Records and reports”; and I will state for your Honor that that is substantially the

(Testimony of Emil J. Dvorak)

same as the other regulation I read and that relates to beef and veal; and the other regulation involved—

The Court: 239.

Mr. McLaughlin: Yes, 239, your Honor; that is even more sketchy; that is a sub-section or paragraph 1364.167; and again it ties itself down to invoices. It says what the invoices must show.

So I submit, your Honor, that if we are going off on trying an issue as to whether a ledger has a false entry as to a loan or something like that, that we are trying issues that are not crimes in any event.

Mr. Strong: The records which are kept pursuant to the regulations in the Emergency Price Control Act are records which relate to sales because, obviously, these being wholesalers of meat, would be records relating to sales and also [48] to their purchases.

And on these records, which the statute requires be kept accurately and truthfully, the entries made are to represent this type of transaction, sales and purchases.

Now, where there is a situation of the type that we think exists in this case, and which we intend to prove—of course, we can't prove the whole thing by one witness, but by others, besides—that this money which is entered here, this \$5,000 which is entered here as a loan, is not in truth a loan but is money which relates to the purchase and sale of meat which, of course, I think counsel will concede, is what the record must keep—what the defend-

(Testimony of Emil J. Dvorak)

ants must keep, rather. The record is the sale or the purchase of meat. If the money involved, in truth, is \$5,000 which came from the sale of meat, then it has to be entered as \$5,000 from the sale of meat, showing exactly who it was sold to, by invoice number or other data, as required by regulation, and how much was received, so that the Emergency Price Control Administration can examine the books, as they are permitted to under the law, and see how much money is being charged and how much is being expended in connection with meat dealings.

What counsel is complaining about basically is purely evidentiary. We say that this is false. It says that it is \$5,000 that was borrowed from Mr. Dvorak and paid back to Mr. Dvorak. Our contention is that it is \$5,000 that came [49] from the sale of meat: it had nothing to do with any loans: and that it is false because it states on its face that it is a loan, whereas it has something to do with the sale or purchase of meat.

The Court: There is an objection that it is premature at this time because there isn't any evidence here at all at the present time connecting this entry with the sale of the meat. Until I hear the evidence I will not be able to rule.

Mr. Strong: And that will come from other witnesses.

Mr. McLaughlin: May I add this, your Honor: I do not think Count 12 is sufficient to charge a sale of meat. In other words, it is tied down. Your Honor in going

(Testimony of Emil J. Dvorak)

over these counts observed that there are specific counts that charge the sales at over ceiling, and there are other counts that you can't tell what they are driving at, frankly. This is a good one. It says they made a false entry in the general ledger showing a loan of \$5,000.

Now, they do not say it was in truth and in fact a sale or it was a consideration for a purchase or anything; and I submit that the count would be insufficient, if they are proceeding on the theory that they expect to prove—and we challenge them to prove it, too—but if they do expect to prove that that \$5,000 was paid as consideration for meat, I submit they have not alleged it.

Mr. Strong: In view of what your Honor said, I am not [50] saying anything further, but we can answer that further if your Honor desires.

The Court: All right.

Mr. Strong: The entry is false as written because it shows on its face that it is a note and a loan, whereas in truth and in fact we will establish it is a sale of meat. The fact that it is a sale of meat and that it comes from the sale of meat is purely evidentiary, and it has to come from other witnesses who will testify to these specific matters.

The Court: Yes. And counsel's objection is that in Count No. 12 there is no indication whatever that this loan of \$5,000 is in any way connected with the sale or purchase of meat.

(Testimony of Emil J. Dvorak)

Mr. Strong: Well, it is indicated in this way:

The Court: What way?

Mr. Strong: That it says it is false and in violation of the requirements of these sections; and these sections deal solely with requirements relative to the purchase and sale of meat.

And I might say that this is really something that properly belongs in a motion for a bill of particulars and that such a motion, as your Honor will see, was made; and that the exact use to which this \$5,000 was put and its source is a matter of proof, of further proof, which we intend to prove.

But, on the face of the record, the record itself does [51] not indicate that it is from the sale of meat, obviously, because then it would prove the falsity right on its face. It indicates on the face of the record that it is a loan, and that is false, we say, because, as we will prove, that is an entry false and in violation of these sections relative to the purchase and sale of meat; and we will prove, later on, by another witness, that this \$5,000 was in fact a sum which came from the sale of meat.

The Court: I will deny the motion at this time and allow an exception to the defense, as they have, anyway, under all these rulings of the court; and I will listen to the testimony and permit the defendants to make a motion to strike if I find that it is not sufficiently established. On the face of it, if it can be established, I can see a possible

(Testimony of Emil J. Dvorak)

connection here. The record is to be kept under the provisions of the Emergency Price Control Act of 1942, and the maximum price regulations of the three regulations named. If that can be connected up, why, of course the Government will be permitted to do it. Proceed.

Q. By Mr. Neukom: Mr. Dvorak, you were testifying in regard to a conversation you had with Mr. William Shubin a little before February the 4th, 1944, over at his plant with regard to a \$5,000 item. Does that bring back what your testimony was on? Do you recall what he said, if anything, to you? [52]

Mr. McLaughlin: Now, your Honor, may I have the same objection I made previously?

The Court: The same objection and the same ruling.

Mr. McLaughlin: And I won't interrupt any more unless there is another objection.

The Court: The same objection to the question, the same ruling, the same ruling entered in the record on this particular point. Proceed.

Q. By Mr. Neukom: Do you recall what he said to you at that time about the \$5,000?

A. About wanting to borrow the \$5,000?

Q. Yes, yes.

A. Well, they were at that time buying an apartment house.

(Testimony of Emil J. Dvorak)

Q. Well, what did he say? You have to tell us what was said.

A. Well, he wanted to borrow the \$5,000 from several of the butchers, and I was one of them.

Q. What did he say it was for?

A. Well, to buy this apartment house, I think.

Q. Do you remember what he told you?

A. Well, concerning what, the loan?

Q. About the \$5,000, yes, and the apartment house.

A. Well, that he would borrow the \$5,000 from me, and also give me \$5,000 right back. [53]

Q. Did he discuss with you how the matter should be handled?

A. Well, I went—I had to go to the bank and draw \$5,000 out of my account.

Mr. McLaughlin: Is he telling conversation now? I don't think it is clear for the record whether he is just telling what he did or what he said.

The Court: No; I don't think it is. What did you do pursuant to this conversation? Did you give him \$5,000 or not?

The Witness: Yes. I went to my bank, I withdrew \$5,000 from my account, also went in the same bank to a different window and got a cashier's check for \$5,000 with the amount that I drew out of my account.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: I show you photostatic copy of cashier's check dated February 4, 1944, payable to William Shubin. Is this a photostatic copy of the check that you secured from your bank? A. Yes; it is.

Q. And to whom did you give that check?

A. To Bill Shubin.

Q. You will notice on the reverse side that it bears an endorsement. A. Yes.

Q. Is that the endorsement of William Shubin? [54]

A. Yes, sir.

Q. And where did you hand this cashier's check to William Shubin? A. Down to my shop.

Q. And at the time that you handed the cashier's check to him what, if anything, did he say?

A. Well, he in return gave me \$5,000 cash.

Q. And anything else?

A. Yes; 15 cents for the cost of that cashier's check.

Q. Then you had \$5,000 in cash back, is that correct?

A. Yes, sir.

Q. Then, a little later on, or about a year later, what were you told by Mr. Shubin, if anything, to do with the \$5,000 that he gave you back for this cashier's check?

A. Well, I had to take it home and hide it.

Q. Is that what he told you?

A. Well, he didn't tell me, but I knew that is what I had to do with it.

(Testimony of Emil J. Dvorak)

The Court: No. Strike it out.

Mr. McLaughlin: Your Honor, did your Honor rule that answer out?

The Court: I struck it out. Proceed.

Q. By Mr. Neukom: Did you have any conversation with Mr. Shubin about your putting that money back into your bank account? [55]

A. Well, I just don't recall. I just can't think that far back.

Q. I see. Then, about a year later did you ever see Mr. Shubin again with respect to that \$5,000 item?

A. Yes, I did.

Mr. Neukom: I would like to offer at this time the photostatic copies of the two checks, subject to the objection that counsel has heretofore made.

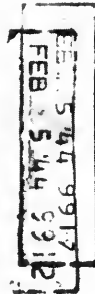
The Court: Subject to that objection, they will be in evidence.

The Clerk: Government's Exhibits 3 and 4 admitted into evidence.

(The documents heretofore marked as Government's Exhibits Nos. 3 and 4, were received into evidence.) [56]

[GOVERNMENT'S EXHIBIT NO. 3]

30-975 BELL BRANCH 90-975
Bank of America
NATIONAL SAVINGS ASSOCIATION
BELL CALIFORNIA
PAY TO THE ORDER OF *William*
N^o 3650267
FEB 4 1966
\$ 5,000.⁰⁰
THE SUM OF **\$5000.00**
CASHIER'S CHECK
DOLLARS
Robert S. [Signature]



William Abraham

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 3 Identification. Date 6/18/46. No. 3 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

[GOVERNMENT'S EXHIBIT NO. 4]

APPLICATION FOR
MONEY ORDER, CASHIER'S CHECK OR DRAFT

DATE FEB 4 - 1944

19

CHECK WHICH ☐ MONEY ORDER ☐ CASHIER'S CHECK ☐ DRAFT ON.

NO. 267 William Shubin

PAY TO ORDER OF (PLEASE PRINT)

AMOUNT DOLLARS 500.00 CENTS

FUNDS RECEIVED

CASH 10

CK ON 500

SUB TOTAL LESS CASH TO CUSTOMER

REC'D BY (SIGNATURE) Emil J. Green

PURCHASED BY

NAME OF PURCHASER, NATURE OF BUSINESS

ADDRESS 5559 Atlantic Blvd Maywood

AMOUNT EXCHANGE CHARGES

TOTAL

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 4 Identification. Date 6/18/46. No. 4 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: I show you a check dated January 19, 1945, in the amount of \$5,200, payable to the order of Emil Dvorak. Do you recall ever having seen that check before? A. Yes, sir.

Q. And who gave you that check?

A. Bill Shubin.

Q. And I notice that the back of the check is endorsed Emil J. Dvorak. Is that your endorsement?

A. Yes, sir.

Q. Will you relate the circumstances of your receiving this check? Where did it take place, to your best recollection? A. In Bill's office.

Q. In the office of the Vernon Hotel and Restaurant Supply Company? A. Yes.

Q. What, if anything, was said at that time?

Mr. McLaughlin: Mr. Neukom, did you ask him who was also present?

Mr. Neukom: Very well.

Q. Who was present?

A. Bill and I and his bookkeeper or cashier.

Q. And what was said by Mr. Shubin or yourself or anybody present?

A. Well, I told him I was going to purchase a home [57] then and I wanted that loan cleared because I needed that money and I had to make it appear as though that was my money and I was getting it back so I could go on with my transaction, and so he had the girl write out a check for \$5,200.

Q. Did you have any conversation with Mr. Shubin about the \$5,000 that you had received from him that you previously testified to?

A. Do you mean the \$5,000 I had at home?

(Testimony of Emil J. Dvorak)

Q. Yes. A. No.

Q. At that time did you owe Mr. Shubin anything?

Mr. McLaughlin: That is objected to as calling for a conclusion.

Mr. Neukom: Well, I will withdraw that question.

Q. Did he owe you anything?

Mr. McLaughlin: That is objected to as calling for a conclusion.

The Court: Well, I submit, your Honor, that a person knows whether or not—

The Court: Find it another way. Put it in the form of a question of claim. Did he claim anything.

Q. By Mr. Neukom: Well, had he made any claim against you that you owed him any money?

A. No, sir.

Q. And when you received this check from him in his [58] office what did you do with it? Did you clear it through your bank?

A. I endorsed it and gave it right back to him.

Q. And you never put it through your bank account?

A. No, sir.

Q. Was there any discussion with Mr. Shubin about this check being for \$5,200 rather than \$5,000?

A. Well, the extra \$200 was to take care of the interest that would have accrued in that time that I had it.

Q. Had you claimed any interest from Mr. Shubin?

A. No, sir.

Q. You had not expected him to pay you any interest, had you? A. No, sir.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: That is objected to as calling for a conclusion from the witness and, your Honor, at this time I think that the proof does not sustain Mr. Strong's statement to your Honor that they were going to show that this money was given to purchase meat. All they have shown is that one of them gave him a check and kept the cash and later on the reverse situation occurred. The first transaction was the check which Mr. Dvorak drew to Mr. Shubin and he got the cash right back for it and he took it home.

Now, Mr. Strong must have known that fact before he made that statement to your Honor that he was going to prove that [59] Mr. Dvorak actually gave Mr. Shubin this money to purchase meat with. He must have known that.

Mr. Strong: Well, your Honor, I didn't say that. That is the only trouble. I said we were going to prove that this \$5,000 came from the sale of meat, but that does not necessarily mean, as counsel seems to imply, that I could prove it through this witness. I have other witnesses who will prove that fact.

The Court: All right.

Mr. Neukom: May we offer the check?

The Court: Received in evidence subject to the same objection of the defense.

The Clerk: That will be Government's Exhibit 19 received in evidence.

(The check referred to was received and marked Government's Exhibit No. 19.)

[GOVERNMENT'S EXHIBIT NO. 19]

No. 6461

VERNON HOTEL & RESTAURANT SUPPLY CO

Quality Meats

3301 East Vernon

Vernon, Calif.

Maywood, Calif. January 19 1945

Pay to the

Order of

Emil Dvorak

\$5,200.00

the sum * * 5200 Dols 00 Cts

Dollars

Vernon Hotel & Restaurant Supply Co.

By Wm A Shubin

23- Maywood Branch - 90-1075

CITIZENS National BANK

Trust & Savings

of Los Angeles

4500 East Slauson Ave. Maywood, Calif.

[On Reverse Side]:

Emil J. Dvorak

Vernon Hotel and Restaurant Supply Co.

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 19 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: Did you at any time in these transactions to which you have testified here with reference to the \$5,000 items actually receive \$5,000 or thereabouts from Mr. Shubin?

A. You mean—

Q. I mean did you receive \$5,000 in addition to what you already had as you have testified to by the cashier's check transaction?

A. All I received from him was \$5,000. [60]

Q. And you gave him the \$5,000 cashier's check?

A. Yes.

Q. And got 15 cents more, the cost of the check?

A. Yes.

Q. And in the second transaction you never got your hands on any additional \$5,000, did you?

A. No, sir.

Q. Now, for how long do you recall that you did business with the Vernon Hotel and Restaurant Supply Company?

A. Well, shortly after they started up their new partnership until I would say six months ago.

Q. Until six months ago, and approximately how many purchases a week have you made from their plant or their partnership?

A. I would say on an average of five a week.

Q. And to your best recollection did you always go there and pick up your meat at their plant?

A. Yes, sir.

Q. And during the period of time up until six months ago from the latter part of 1942 as I believe you testified to, when you would go to the plant, what is your

(Testimony of Emil J. Dvorak)

best recollection as to having seen one or either of the defendants there while you were transacting your business?

A. Well, one or the other or both were there at all times outside of when they would be on a vacation or some- [61] thing like that.

Q. Now, over that period of time do you recall whether or not you ever paid to Frederick Shubin sums of money in addition to the invoice price of the item of meat that you took away?

The Court: You may answer that yes or no.

The Witness: No.

Q. By Mr. Neukom: Do you recall whether or not you ever paid to Jack Kissel a sum of money in addition to the invoice price of the meat that you took away?

A. Yes.

Q. Have you any recollection of about how many instances in the period of over two years that you conducted business with these partners that you paid Jack Kissel? A. I do not remember.

Q. Do you have an approximation? Was it more than one time?

Mr. McLaughlin: Just a moment. Your Honor, I submit that that is too vague and indefinite. We have no way to meet it and it does not tie down to any particular count or invoice.

The Court: Well, I assume that would have to be connected up to be of any value as evidence, but it is proper for the witness to state whether it was once, twice, or ten times and then the details will have to be developed to make [62] it of any value to the jury.

(Testimony of Emil J. Dvorak)

The Witness: I would say several times.

Q. By Mr. Neukom: Well, is several more than—what do you mean by several?

A. Well, lots of times. I can't put my finger on how many times.

The Court: Just say once, twice, or five times. That is what counsel is asking for.

The Witness: Okay, five times.

The Court: No, I want you to tell me.

The Witness: Well, I just don't remember how many times I paid him over the ceiling.

The Court: Just the best of your recollection.

Q. By Mr. Neukom: The best of your recollection is all that we are asking for, Mr. Dvorak.

A. Ten times.

The Court: All right.

Q. By Mr. Neukom: Now, Mr. William Shubin, how many times to the best of your recollection have you—

Mr. McLaughlin: Are you through with the question?

Mr. Neukom: I will reframe it.

Q. Now just answer this question yes or no and then wait until the objection can be made. Do you recall whether or not you have paid Mr. William Shubin in excess of the ceiling price of the goods that you took away during the two [63] years or thereabouts that you did business with him?

Mr. McLaughlin: We object to that on the ground that it calls for a conclusion. If he wants to say in excess of the amount shown on the invoice—

The Court: Yes, I think that is a good objection.

(Testimony of Emil J. Dvorak)

Mr. Neukom: That is correct.

Q. Do you recall approximately how many times you paid Mr. William Shubin in excess of the amount which was shown on the invoice for the items that you secured from his establishment?

Mr. McLaughlin: The same objection unless it is connected up, your Honor. It is immaterial and too vague.

The Court: Overruled. Proceed. Your best recollection.

The Witness: Well, a half a dozen times.

The Court: All right.

Q. By Mr. Neukom: Well, now, Mr. Dvorak, in the latter part of 1942 until you quit doing business with this partnership concern, do you recall receiving any meats from that organization such as loins of pork for which you did not pay in excess of the invoice price?

Mr. McLaughlin: That is objected to. He has gone into it. He asked him how many times he paid these two defendants and if he paid somebody else in excess it would be immaterial.

Mr. Neukom: I do not think so, your Honor. I think that [64] goes to show the course of business practice and from the books if I can show that this man in each and every instance was paying in excess and show from the evidence that he was paying with the knowledge of these defendants, I think it is part of the general conspiracy to show the course of conduct of these defend-

(Testimony of Emil J. Dvorak)

ants, and they can't close their eyes on the proposition and say that maybe somebody else collected it.

The Court: I will sustain the objection.

Q. By Mr. Neukom: Mr. Dvorak, I am showing you now what was identified as Government's Exhibit 6.

The Court: We will take our afternoon recess. Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss the matter among yourselves nor permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court. We will take a 10-minute recess.

(Short recess.)

The Court: Stipulate that the jury are present?

Mr. Neukom: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Stipulate that the defendants are in court?

Mr. Neukom: So stipulated.

Mr. McLaughlin: So stipulated. [65]

The Court: Proceed.

Mr. Neukom: Counsel has indicated his willingness to stipulate that as to Government's Exhibits all for identification No. 6, 7, 8, 9, and 10, that where the indication of price is involved that that represented the ceiling price allowed for the item under the OPA as of the dates in question. I believe that is correct.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: Yes, Mr. Neukom, that is correct.

Mr. Neukom: Thank you.

Q. Now, taking Government's Exhibit 6 which bears date of January 21, 1944, an invoice, you will note that it says A veal, 234 pounds, at a price of 23 cents. What does the "A" mean?

A. That was the grade designated for that type of veal.

Q. And an invoice price of \$53.82. Do you have a recollection as to whether or not at the time in question you paid to one or either or all of these defendants a price in addition to the invoice price of this commodity or this meat?

A. Yes.

Mr. McLaughlin: Your Honor, may I make this objection, and I think, Mr. Neukom, you can reframe the question. In other words, instead of asking if it was the price, if he paid him any money in addition. [66]

Mr. Neukom: All right.

Mr. McLaughlin: Otherwise it is a conclusion.

The Court: Proceed.

Q. By Mr. Neukom: Did you pay any money?

A. Yes.

Q. To your best recollection to whom of these defendants did you pay such money?

A. Well, it would either be Jack or Bill.

Q. But you are not sure just which one?

A. No, not which one at the time.

(Testimony of Emil J. Dvorak)

Q. To the best recollection how much money in addition to the \$53.82, the invoice price, did you pay?

A. Five cents over the ceiling.

Mr. McLaughlin: I move to strike that on the ground that it does not state how many dollars. It is a conclusion.

The Court: That is not necessary, counsel. It is a matter of mathematics if that is the testimony.

Mr. McLaughlin: I agree with that, your Honor, that he can testify—in other words, he says five cents over the ceiling, but my point is that it would be more provative of something if he stated how many dollars. The invoice shows how many dollars.

The Court: If it does. Does the invoice show?

Mr. Neukom: Well, could I ask this for clarification?

The Court: Yes. [67]

Q. By Mr. Neukom: You said five cents over the ceiling. Was that per pound or what?

A. Per pound.

Q. The invoice shows a weight of 234 pounds.

The Court: It is not necessary to have the witness do any mathematics on the stand. Proceed.

Mr. Neukom: Very well. I would like to offer in evidence Government's Exhibit 6.

The Court: In evidence.

The Clerk: Government's Exhibit 6 received into evidence.

(Testimony of Emil J. Dvorak)

(The document referred to was received in evidence and marked as Government's Exhibit No. 6.)

[GOVERNMENT'S EXHIBIT NO. 6]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., J 1-21-1944

Sold to Emel Devorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
1099	4.7	A Veal	234	23	53 82

Pd

[Stamped]: Paid A

39609

Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 6 Identification. Date 6/18/46. No. 6 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: I show you an invoice bearing date July 19, 1944, and it says "N. Y." Does that mean New York? A. Yes.

Q. And is that pork?

A. Yes, pork. Short cuts is pork.

Q. It says weight 100 pounds at a price of 26 and a fraction. I can't read it. Is it 1/4 or 1/2?

A. 1/2.

(Testimony of Emil J. Dvorak)

Q. It shows the price of \$26.25? A. Yes.

Q. Another item S. C. That is short cuts?

A. Yes, pork. [68]

Q. And another item— A. Skinned pork legs.

Q. Skinned pork legs at 27-1/2 cents, and invoice price of \$76.58. Do you have a recollection of having paid moneys in addition to the \$76.58 to one, either or all of these defendants? A. Yes.

Q. At or about the date this bears? A. Yes.

Q. And to your best recollection to whom did you pay that? A. To Bill or Jack.

Q. Jack Kissel? A. Yes.

Q. Do you recall how much a pound at that time if any you were paying extra for the New York cuts of pork above the 26-1/2 or 26-1/4 cents? I don't know which it is.

A. Well, at that time there would be about five cents a pound for short cuts and three cents for New Yorks, and about five cents for pork legs.

Q. And did you pay that by cash?

A. By cash.

Q. Did you receive a receipt for that?

A. No receipt.

Mr. Neukom: I would like to offer this in evidence.
[69]

The Court: In evidence.

Mr. Neukom: This is offered in support of count 4, your Honor.

The Clerk: Government's Exhibit 7 received in evidence.

(Testimony of Emil J. Dvorak)

(The document referred to was received in evidence and marked as Government's Exhibit No. 7.)

[GOVERNMENT'S EXHIBIT NO. 7]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., July 19, 1944

Sold to Emil Dvorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
		N Y	100	.26¼	26.25
		S/C	85	.27½	23.38
		Spl legs	98	.27½	26 95
					<hr/> 76.58

[Stamped]: Paid A

41736

Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 7 Identification. Date 6/18/46. No. 7 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: I show you the invoice identified with count 5, representing the next invoice, Government's Exhibit 8 for identification, and the invoice No. 42076.

These invoices have numbers on the bottom, your Honor, in red, which is identified also with the indictment so that there are several tie-ins to the clarification of them.

(Testimony of Emil J. Dvorak)

Do you recall from having looked at this invoice having made a purchase from the defendants operating under the trade name of Vernon of the items that are identified in this particular invoice? A. Yes.

Q. Now, the total of the invoice is \$111.27. Is that correct? A. Yes.

Q. Now, do you recall as to any of those items? Will you please look at the invoice and state whether or not you paid a sum of money to one or either or all of these defendants at the time you received that merchandise in addition to the invoice price? [70] A. Yes.

Q. Now, as to hog hearts. Did you pay any additional price than the 16 cents shown there? A. No.

Q. As to H. livers, that is hog livers? A. Yes.

Q. Did you pay any additional price? A. No.

Q. As to S. K., what does that mean?

A. Short cut pork loins.

Q. Where there is a price of 27-1/2 cents. What is your best recollection as to how much per pound you paid if any at all?

A. About five cents a pound over the ceiling.

Q. Now, as to the next item, N. Y.

A. New York.

Q. New York, at 26-1/4 cents. How much a pound in addition did you pay? A. Three cents.

Q. As to P. L. leg. What is that?

A. Pork loin.

Q. At a price of 27-1/2 cents. How much did you pay, if anything? A. Five cents.

Q. Five cents a pound in addition to the invoice? [71]

A. Yes.

Mr. Neukom: I will offer this in evidence.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: Is there any evidence to show who he paid that to? I don't think you asked that question.

Q. By Mr. Neukom: What is your recollection as to who you paid that to? A. Bill or Jack.

Q. The defendants in this case? A. Yes.

The Court: In evidence.

The Clerk: Government's Exhibit 8 received in evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 8.)

[GOVERNMENT'S EXHIBIT NO. 8]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 8-4-1944

Sold to Emel Devorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
		Hog Hearts	10½	16	2 40
		H Livers	10	18	1 80
		S K	136	27½	37 40
		NY	157	26¼	41 21
		P L Leg	103½	27½	28 46

Total 111 27

42076

Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 8 Identification. Date 6/18/46. No. 8 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: I will show you this invoice which bears a number in red, serial No. 13563, offered in support of count 6, Government's Exhibit 9 for identification, and it bears the date of September 21, 1945, on the Vernon Hotel and Restaurant Supply Company. After looking at this invoice do you recall this invoice?

A. Yes, sir.

Q. As a matter of fact, all of the invoices that I have shown you, the carbon copies, did you produce them and turn them over to the government in connection with the subpoena? A. Yes. [72]

Q. And requests that have been made to you?

A. Yes.

Q. And the carbon copies, to the best of your recollection are they in the same condition as they were when you received them in the transactions that you have testified to? A. Yes.

Q. With the exception that there have been certain little numbers put on here such as "Count 6" that we have put on for clarification? Is that correct?

A. Yes.

Q. S. K. There is an item here of 100 pounds. What does that mean? A. Short cut pork loins.

Q. And N. Y.? That is New York pork loins?

A. New York shoulders.

Q. Shoulders, and the price is 25-3/4 cents for the shoulders and 26-3/4 for the short cuts?

A. Yes.

(Testimony of Emil J. Dvorak)

Q. Do you have any recollection of having paid in addition to the invoice price of \$66.66 any moneys to any one or either or all of these defendants?

A. Yes.

Q. Over and above that. To the best recollection, to whom if any of such defendants have you paid that money?

A. To Bill or Jack. [73]

Q. And was that on or about the date of the invoice in question?

A. It was always on the same date that I paid the invoice.

Q. Well, was that the date you actually secured the merchandise?

A. Yes, sir.

Q. And was that paid in cash?

A. In cash.

Q. Do you have any recollection of approximately how much in September of 1945 you paid for the first item, the short cuts of pork loin?

A. Yes, about five cents for short cuts and about three cents for New Yorks.

Q. That was over and above the price indicated there per pound?

A. Yes.

Mr. Neukom: I would like to offer this in evidence as Government's Exhibit 9.

The Court: In evidence.

The Clerk: Government's Exhibit 9 received in evidence.

(Testimony of Emil J. Dvorak)

(The document referred to was received in evidence and marked as Government's Exhibit No. 9.)

[GOVERNMENT'S EXHIBIT NO. 9]

No. 13563

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Los Angeles 11, Calif., 9/21 1945

Sold to E. Dvorak

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
800	80	S K	100	26¾	26 75
930	60	N Y	155	25¾	39 91
<hr/>					<hr/>
1730					66 66

E J Dvorak

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 9 Identification. Date 6/18/46. No. 9 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross. Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: I show you invoice offered in support of count 7, Government's Exhibit 10 for identification, [74] invoice No. 16645, on the same bill head, bearing the date of December 12, 1945, and ask you if you have seen this document before. A. Yes.

(Testimony of Emil J. Dvorak)

Q. Did you purchase on or about the date that this bears the items indicated there, namely items in the total amount of \$246.40? A. Yes.

Q. And from the defendants in this case, their partnership? A. Yes.

Q. The first item is S/C, 138 pounds. What does that mean? A. Short cut pork loins.

Q. At a price of 27 cents. Is that correct?

A. Yes.

Q. Now, at the time you paid for these invoiced merchandise, do you recall whether you paid one, either or all of these defendants any sum for any of the items designated on this invoice in addition to what is listed as the price per pound? A. Yes.

Q. And as to the first item which is 27 cents for short cuts, to your best recollection how much a pound more were you paying, if any? [75]

A. Five cents for short cuts.

Q. And to whom of these defendants is it your best recollection that you paid the items indicated here?

A. Either Jack or Bill.

Q. Now, these New York porks. The price is 26 cents here. How much if any did you pay?

A. Three cents.

Q. What is the links?

A. Link sausage. There was nothing over on that.

Q. Nothing over on that. The next items is skinless weiners. A. Nothing over on the weiners.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: Will you speak a little louder?

Q. By Mr. Neukom: Speak up so that the last juror may hear you. I have to stand here to show you these items. The next one is pork liver.

A. There was nothing ever charged for pork liver or pork hearts.

Q. Well, beef hearts. A. And beef hearts.

Q. This R. E. Bacon—is that bacon?

A. It is bacon all right.

Q. There is a price of 27 cents. Do you recall how much more per pound you paid if anything?

A. The same as the pork items, five cents per pound [76] over.

Q. And the hams? A. The same.

Q. And the next item, G. veal H. Q.

A. That is veal hindquarters, five cents.

The Court: Will you speak a little louder?

The Witness: Veal hindquarters at five cents.

Q. By Mr. Neukom: And was that amount of money paid in cash? A. Yes, sir.

Mr. Neukom: I would like to offer this in evidence as Government's next in order.

The Court: In evidence.

The Clerk: Government's Exhibit 10 received in evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 10.)

[GOVERNMENT'S EXHIBIT NO. 10]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

No. 16645

Los Angeles 11, Calif., 12-12 1945

Sold to Emil Dvorak

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
	11	S/C	138	27	37.26
		N/Y	182	26	47.32
		Links	40	35	14.00
		Skinless Wieners	40	27½	10.80
		Pg liver	18	26	4.68
		Bf hrts	12	18	2.16
		R E Bacon	137	27	36.99
		R E Hams	189	34¼	64.73
		G Veal H. Q.	115	24¾	28.46
					<hr/> 246.40

Emil J Dvorak.

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 10 Identification. Date 6/18/46. No. 10 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Mr. Neukom: Counsel, I have for identification invoices identified from 11 to 18 inclusive which in all instances show under a price column a certain figure such as 1 A veal, 25-3/4 cents, 1/18. Will it be stipulated that as of the dates in question on the invoices that the prices there reflected were OPA prices allowable for the items so designated?

Mr. McLaughlin: Those are on the invoices of the Vernon Hotel and Restaurant Supply Company?

Mr. Neukom: Yes, those are all the Vernon Hotel and [77] Restaurant Supply Company invoices.

Mr. McLaughlin: Yes, I will so stipulate. Are they the Emil Dvorak invoices?

Mr. Neukom: Yes, those are all Emil Dvorak invoices.

Mr. McLaughlin: All right.

Q. By Mr. Neukom: Will you please refer to Government's Exhibit 11 which is offered in support of count 8 and which bears a serial number of 44072 and dated October 25, 1944?

Does this refresh your memory of having purchased 1-A veal, 200 pounds, on or about that date?

A. Yes, sir.

Q. And from the defendants here at their plant?

A. Yes, sir.

Q. You will note that there is a price indicated of 22 3/4 cents. I believe it is.

A. Yes, sir.

Q. 22 3/4 cents per pound. That is correct, isn't it, that is for the poundage?

A. Yes, per pound.

(Testimony of Emil J. Dvorak)

Q. And do you recall whether on that date you paid anything in addition to the invoice price to one or either of the defendants here? Just answer that yes or no.

A. Yes.

Q. And to whom of the defendants is it your best [78] recollection that you paid any additional price?

A. It says "Jack" right on the invoice.

Mr. McLaughlin: Just a moment. I move to strike the answer. It is not responsive.

The Court: Who did you pay it to?

The Witness: To Jack.

Q. By Mr. Neukom: You have observed here that under the word "Paid"—

A. In the word "Paid" it says "Jack."

Q. In the stamp "Paid" there is the word "Jack." Does that help refresh your memory?

A. Yes, sir, it does.

Q. And how much in addition per pound did you pay for this veal to the defendant Jack Kissel on that date in question? A. Five cents over.

The Court: Is that grade A veal?

The Witness: Grade A veal.

The Court: All right.

Mr. Neukom: I will offer Government's Exhibit 11 in evidence.

The Court: In evidence.

The Clerk: Government's Exhibit 11 received in evidence. [79]

(The document referred to was received in evidence and marked as Government's Exhibit No. 11.)

(Testimony of Emil J. Dvorak)

[GOVERNMENT'S EXHIBIT NO. 11]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 10-25 1944

Sold to Emil Dvorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
		1-A-Veal	200	22 $\frac{3}{4}$	45.50

[Stamped]: Paid Jack

44072

Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 11 Identification. Date 6/18/46. No. 11 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: Will you please inspect the next document which is Government's Exhibit 12 for identification, serial No. 13357, offered in support of count 9. The total price is \$121.77. There are three items, A veal, at 22 $\frac{3}{4}$ cents, and the pork—

A. Short cut pork loins.

Q. And the N. Y.?

A. The New York shoulders.

Q. Do you have any recollection of paying to either of the defendants any sum in addition to the price per pound that is indicated for those three items there?

A. Yes, sir.

Q. To your best recollection to which of the defendants did you pay it?

A. To either Jack or Bill.

(Testimony of Emil J. Dvorak)

Q. At the plant? A. At the plant, yes, sir.

Q. For the veal how much more per pound?

A. Five cents for veal and also five cents for short cut pork loins and three cents for New Yorks.

Q. Was that a cash transaction, the overage?

A. They were all cash transactions.

Mr. Neukom: I will offer Government's Exhibit 12 in [80] evidence.

The Court: In evidence.

The Clerk: Government's Exhibit 12 received in evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 12.)

[GOVERNMENT'S EXHIBIT NO. 12]

No. 13357

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Los Angeles 11, Calif., 9/17 1945

Sold to E. Dvorak

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
348	24	OF veal	145	22¾	32 99
1184	80	S/C	148	26¾	39 59
1146	60	N Y	191	25¾	49 19
<hr/>					<hr/>
2678					121 77

Emil J Dvorak.

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 12 Identification. Date 6/18/46.

(Testimony of Emil J. Dvorak)

No. 12 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. Mr. Neukom: I show you Government's Exhibit 13 for identification, offered in support of Count 16, serial No. 14649, dated October 22, 1945, and a total price of \$247.26. There are four items here.

A. Two items.

Q. Oh, two items. Smoke is a charge? A. Yes.

Q. That is a charge that it is customary to make for smoking that particular merchandise. Is that it?

A. Yes.

Q. What is that first item?

A. Bellies, fresh pork bellies. You make bacon out of them.

Q. 529 pounds at a price of 21 cents. The next item is 27 skin. What is that? A. Skin pork legs.

Q. And 371 pounds at 27 cents. Do you recall having paid in addition to the invoice price here any sum in cash over and above the price per pound indicated on the invoice to either of the defendants here? [81]

A. Yes.

Q. To whom is it your best recollection that you paid the money? A. To Jack or Bill.

Q. And as to the bellies, how much per pound in addition to the 21 cents was paid?

A. Seven cents a pound on each of them.

(Testimony of Emil J. Dvorak)

Q. On the two items, seven cents a pound?

A. Yes.

Mr. Neukom: I will offer Government's Exhibit 13 in evidence.

The Court: In evidence.

The Clerk: Government's Exhibit 13 received in evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 13.)

[GOVERNMENT'S EXHIBIT NO. 13]

No. 14649

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Los Angeles 11, Calif., 10-22 1945

Sold to Emil Dvorak

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
2645	5.0	44 Bellies	529	21	111 09
—		Smoke	529	04	21 16
2226	6.0	27 Sp Pk legs	371	27	100 17
—		Smoke	371	04	14 84
<hr/>					<hr/>
4871					247.26
M					M

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 13 Identification. Date 6/18/46. No. 13 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: I will next show you Government's Exhibit 14 for identification which is offered in support of count 17, serial No. 3729, dated 5/8/45. You have seen this before? A. Yes, sir.

Q. In fact all of these are your invoices?

A. Yes, they are.

Q. Or copies of them? A. Yes. [82]

Q. To the purchase price of \$89.10 for any of the items indicated on this last Exhibit No. 14 do you recall having paid in excess of the price per pound a sum of money to either of the defendants here? A. Yes.

Q. To which of the defendants would you say?

A. To Jack or Bill.

Q. Now, the New Yorks, that is in May of 1945, how much per pound did you pay?

A. Three cents for New Yorks.

Q. And fresh bellies at that time?

A. Seven cents. Short cuts were five cents. Pork loins were seven cents, and nothing on the other two items.

Q. Nothing on the fat or the pork trimmings?

A. No.

The Court: What count is that?

Mr. Neukom: That is offered in support of count 17. It is Government's Exhibit 14 in evidence.

The Court: All right.

The Clerk: Government's Exhibit 14 received in evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 14.)

(Testimony of Emil J. Dvorak)

[GOVERNMENT'S EXHIBIT NO. 14]

No. 3729

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Los Angeles 11, Calif., 5-8 1945

Sold to Emil Dvorak

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
777	7.0	N/Y	111	25½	28 30
553	7.0	Fresh Bellies	79	21¼	16 79
544	8.0	S/C	68	27	18 36
344	8.0	Pork Legs	43	26¾	11 50
330	5.0	Pk Fat	66	15	9 90
112	6.6	Pork Trim'gs	17	25	4 25
<hr/>					
2660					<hr/> \$89.10

Pd.

[Stamped]: Paid P

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 14 Identification. Date 6/18/46. No. 14 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Mr. Neukom: Mr. McLaughlin, I am not as familiar with this as I should be. I am offering no apologies. Does our stipulation go this far, that the prices in-

(Testimony of Emil J. Dvorak)

licated on these [83] invoices here are as of the dates in question?

Mr. McLaughlin: I intended it to, Mr. Neukom.

Mr. Neukom: As to the items involved, the maximum prices permitted under the OPA?

Mr. McLaughlin: Yes, that is right.

Mr. Neukom: That is what I thought.

Mr. McLaughlin: You don't have to worry about that.

Mr. Neukom: Very well.

Q. I show you Government's Exhibit 15 for identification, offered in support of count 18, serial No. 3327, total purchase price of \$169.35. Look at the date of the invoice. Do you recall that on that date you paid to one, either or any of these defendants for the items involved there or for some of them a sum of money in addition to the price per pound indicated on the invoice? A. Yes. [84]

Q. And to whom, if you recall, did you pay such sums of money? A. To Jack or Bill.

Q. Was that a cash transaction?

A. Always cash transaction.

Q. The New York porks, how much?

A. Three cents; and the shortcut pork loins were five.

Q. And beef kidneys?

A. Beef kidneys, nothing. There was nothing over on the beef kidneys or the back fat or the C bull.

Mr. Neukom: In other words, the last four items there was nothing charged over on those.

I offer 15 into evidence.

The Clerk: Admitted, your Honor?

(Testimony of Emil J. Dvorak)

The Court: In evidence.

The Clerk: Government's Exhibit 15 in evidence.

(The document heretofore marked as Government's Exhibit No. 15, was received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 15]

No. 3327

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Sold to Emil Dvorak

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
861	7.0	N Y	123	25½	31 37
880	8.0	S/C	110	26½	29 15
	—	Bf Kid's	26	14	3 64
	—	✓ ✓	25	10	2 50
810	5.0	Bk Fat	162	14½	23 49
2288	5.2	½ C Bull	440	18	79 20
<hr/>					
4839					169.35

pd

[Stamped]: Paid AW

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 15 Identification. Date 6/18/46. No. 15 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Mr. Neukom: Q. 16 is in support of Count 20, invoice 15584; this is November of '45; a total amount of \$319.89. Do you recall whether you paid to one or either of the defendants on that date or shortly thereafter a sum of money in addition to the price per pound indicated beside each of the respective itemized articles? [85] A. Yes.

Q. Now, to whom, is your best recollection, that you paid that? A. To either Jack or Bill.

Q. The AA lamb, what, if anything, did you pay over 27½ cents a pound?

A. Five cents a pound over ceiling.

Q. The next item?

A. A veal hindquarter, five cents; A beef, it is not clear in my mind exactly how much I paid on the beef at that time.

Q. What is your best recollection?

A. Well, I would say about three cents at that time.

Q. Over and above the price indicated there?

A. Yes.

Q. The skin legs?

A. Skin legs is five cents; and the New Yorks is three; and the shortcut pork loins is five cents. Nothing over on the sausage.

Mr. Neukom: I am offering 16 in evidence.

The Court: In evidence.

The Clerk: Government's Exhibit 16 in evidence.

(The document heretofore marked as Government's Exhibit No. 16, was received into evidence.)

(Testimony of Emil J. Dvorak)

[GOVERNMENT'S EXHIBIT NO. 16]

No. 15584

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Los Angeles 11, Calif., 11-15 1945

Sold to E Dvorak

Address Del—

Total Points	Point Value	Item	Weight	Price	Amount
483	2.5	A A lamb	193	27½	53 08
306	3	A Veal H.Q.	102	25	25 50
1160	2	A Beef	580	22¼	129 05
576	6	Sp legs	96	27¼	26 16
786	6	N/Y	131	26¼	34 39
966	7	S/C	138	27¼	37 61
	—	link Sausage	40	35¼	14 10
<hr/>					
4277					319 89
					<hr/>
					319 89

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 16 Identification. Date 6/18/46. No. 16 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: I show you 17, offered in support of [86] Count 21, invoice 45741, and it is dated in

(Testimony of Emil J. Dvorak)

December of 1944, total price of \$184.95. Do you recall whether or not you paid any sums in addition to the invoice price to one or either of the defendants?

A. Yes.

Q. And to whom is it your best recollection?

A. To Jack or Bill.

Q. Now, take the items, just read them off and state how much per pound over you paid for each item, to your best recollection.

A. Well, the New Yorks were three cents and the shortcuts were five and the pork legs were five and the fresh bellies were five, and nothing on the pork trimmings.

Mr. Neukom: I offer 17 into evidence.

The Court: In evidence.

The Clerk: 17 in evidence.

(The document heretofore marked as Government's Exhibit No. 17, was received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 17]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 12-26 1944

Sold to Emil Devorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
		N/Y	289	25	72 25
1185	50	S/C	257	26	66 82
		Pk Legs shd	72	26	18 72
		Fresh Bellies	96	21	20 16
		Pk Trimings	28	25	7 00
✓					
Pd					184.95

(Testimony of Emil J. Dvorak)

[Stamped]: Paid AW

45741 Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 17 Identification. Date 6/18/46. No. 17 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: I show you Government's Exhibit No. 18, offered in support of Count 22, Invoice No. 4437, with a total purchase price, invoice price, of \$453.17. As of the date of this invoice, which is in June of 1945, June 7th, do you recall whether or not you paid one or either of these defendants any sum of monies in addition to the invoice price, total invoice price? [87] A. Yes.

Q. Who is it your best recollection to whom you paid such money? A. To Jack or Bill.

Q. At the plant? A. At the plant; yes.

Q. Will you take them down the line and state how much per pound you paid in excess or extra?

A. Well, on A lambs, five cents a pound over ceiling, and on the shortcuts pork loins, five cents, and the New Yorks three cents, and—

Q. What is that "B Rd"?

A. Well, that is rounds. Nothing on this stuff. Bellies was five cents and legs was five cents; nothing on the back fat, and the four cents is a regular charge on the smoking.

(Testimony of Emil J. Dvorak)

Q. Did you pay an additional four cents on the legs?

A. Well, over ceiling, yes, five cents.

Q. And the four cents, also, for the smoking?

A. Yes.

Q. The work of smoking? A. Yes.

Mr. Neukom: I am offering Government's Exhibit 18.

The Court: In evidence.

The Clerk: Government's Exhibit 18 in evidence. [88]

(The document heretofore marked as Government's Exhibit No. 18, was received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 18]

No. 4437

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Los Angeles 11, Calif., 6-7 1945

Sold to E Dvork

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
1350	5.0	A lamb	270	25¾	69 53
1550	5.0	A A ✓	310	27¼	84 48
1467	3.7	S/C	163	27	44 01
	9.0				
1050	7.0	N/Y	150	26	39 00
357	7.0	B Rd	51	21¼	10 84
275	3.4	B Reg chux	81	20	16 20
104	2.8	Bf flanks	37	15½	5 74
1624	7.0	Bellies	232	21	48 72
—		✓	232	04	9 28

(Testimony of Emil J. Dvorak)

2256	8.0	Legs	282	27	76 14
—		✓	282	.04	11 28
2024	8.0	Bk Fat	253	15	37 95
<hr/>					<hr/>
12,057					453 17

Pd

[Stamped]: Paid P

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 18 Identification. Date 6/18/46. No. 18 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: In all instances in this case when you have referred to Jack or Bill you mean Jack Kissel or William Shubin, do you not? A. Yes.

Mr. Neukom: I am offering—I have not had these marked. The next three which are being offered as, I believe, overt acts in support of the conspiracy or the first count. We will ask they be marked.

The Clerk: Government's Exhibits 20, 21 and 22, respectively, for identification.

(The documents referred to were marked as Government's Exhibits Nos. 20, 21 and 22, for identification.)

Q. By Mr. Neukom: I show you Government's Exhibit No. 20—

(Testimony of William O. Miller)

The Court: I see that we will not be able to conclude with the examination of this witness.

Mr. Neukom: Very well, your Honor.

(The court thereupon admonished the jury and recess was taken until 10:00 o'clock a. m., of the following day, Wednesday, June 19, 1946.) [89]

Los Angeles, California, Wednesday, June 19, 1946,
10:00 a. m.

(Case called by the clerk.)

Mr. Strong: Ready for the Government.

Mr. McLaughlin: Defendants are ready and all in court.

The Court: Stipulate the jury are present?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Proceed.

Mr. Neukom: Your Honor, there is a matter: We wanted to put some records on and release some bank officials.

The Court: Proceed.

Mr. Strong: Mr. Miller.

WILLIAM O. MILLER,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: William O. Miller.

(Testimony of William O. Miller)

Direct Examination

By Mr. Strong:

Q. Mr. Miller, what is your occupation?

A. Assistant Chief Clerk, Citizens National Trust & Savings Bank.

Q. Have you been subpoenaed to appear here and produce [92] certain records of the bank?

A. Yes, sir; I have.

Q. Are those records customarily in your custody and control? A. Yes, sir; they are.

Q. Have you produced those records?

A. Yes, sir.

Q. May I see them?

(Witness producing records.)

Q. Are these records which you were requested to produce pursuant to subpoena?

A. Yes, sir; they are.

Mr. Strong: Your Honor, may we have the photostatic copies of these records marked for identification at this time?

The Court: They may be marked.

Mr. Strong: I suggest that the entire group of records be given one number.

The Court: Satisfactory.

The Clerk: They will be Government's Exhibit No. 23 for identification.

Mr. Strong: Counsel for the defendants informs me that they will stipulate that these are the bank records of the persons, the defendants and others, as appearing on the face of them, and that they have no objection with respect [93] to the competency of these exhibits.

(Testimony of Homer L. Smith)

Mr. McLaughlin: Well, I have no objection to the use of the copies, put it that way, photostatic copies. When they are offered I may want to make an objection. Frankly, I do not know what the purpose of the records is yet.

The Court: It is so understood.

Mr. Strong: We will return to you the original records.

The Witness: Thank you.

Mr. Strong: That is all.

Mr. Smith.

HOMER L. SMITH,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Homer L. Smith.

The Clerk: Is that Smith, S-m-i-t-h?

The Witness: S-m-i-t-h; yes, sir.

Direct Examination

By Mr. Strong:

Q. Mr. Smith, what is your occupation?

A. I am the manager of the escrow department of the Citizens National Bank, Maywood.

Q. Are you appearing here pursuant to subpoena?

A. Yes, sir.

Q. A subpoena requiring you to produce certain records [94] of the bank?

A. Yes, sir.

(Testimony of Homer L. Smith)

Q. Those records are in your custody as manager of the escrow department? A. Yes, sir.

Q. Have you brought those records? A. I have.

Q. May I see them, please? e

(Witness producing records.)

Mr. Strong: May I have these records marked Government's exhibits for identification?

The Clerk: That will be Government's Exhibit No. 24 for identification.

The Court: Mr. Cross, how many sheets are attached to Exhibit 23?

The Clerk: I have not ascertained yet, your Honor. I will find out in just a few minutes. [95]

Mr. Strong: Defense counsel informs me that he will stipulate that these are the records of the bank in connection with the matter to which they relate on their face.

The Court: So understood.

Mr. Strong: That is all.

Mr. McLaughlin: They are not being offered in evidence?

Mr. Strong: No, just for identification.

The Court: What is the exhibit number?

The Clerk: No. 24, your Honor.

Mr. Neukom: I will call Mr. Dvorak. You were sworn yesterday, Mr. Dvorak. Take the stand, please.

EMIL J. DVORAK,

a witness on behalf of the government, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Cont'd)

By Mr. Neukom:

Q. Mr. Dvorak, I show you invoice marked Government's Exhibit 20 for identification. Your Honor, this is offered in support of count 1, subsection R. That is the conspiracy count.

On October 31, 1944, and looking at this invoice with the red numeral 44235, it bears the total purchase price of \$77.96. That represents, does it not, merchandise that you purchased from the defendants' partnership here? [96] A. Yes.

Q. Now, on the date in question do you have any recollection of having paid to either or any of the defendants a sum of money in excess of the invoice price per pound as is indicated here? Your answer will be yes or no. A. Yes.

Q. Now, do you recall how much moneys in addition to the price indicated here you paid for the S. K.?

A. Short cut pork loins?

Q. Yes.

A. Well, at that time I say I paid five cents over per pound over the ceiling and three cents on the New Yorks.

Q. Do you mean by that that you paid it over the amount that is indicated there as the price? A. Yes.

Q. Where it is 27½ cents per pound you paid five cents per pound in addition to that? A. Yes.

(Testimony of Emil J. Dvorak)

Q. And by cash? A. Yes.

Q. And as to the New Yorks?

A. Three cents a pound over.

Q. As to the P. L. trimmings?

A. There was nothing extra for that.

Q. Nothing paid for that. [97]

Mr. Neukom: I will offer Government's Exhibit 20 in evidence.

Mr. McLaughlin: I don't think you asked him who he paid it to.

Mr. Neukom: All right.

Q. To the best of your recollection to whom of the defendants did you pay that overage?

A. Well, to either Jack or Bill.

Q. Was this invoice, Government's Exhibit 20, was this given to you at the time you made the purchase from one of the employees or persons present at the Vernon Hotel and Restaurant Supply Company?

A. Yes.

Q. And it is an incident to your purchasing the merchandise here? A. Yes.

Mr. McLaughlin: Just a moment. I will object to that on the ground that it calls for a conclusion from the witness and I move to strike the answer.

Mr. Neukom: Well, I will reframe it.

Mr. McLaughlin: Asking him if it was an incident to the purchase.

The Court: Reframe it and tell just exactly how it got in your hands.

Q. By Mr. Neukom: How did you happen to get this in- [98] voice, tell us the steps?

(Testimony of Emil J. Dvorak)

A. Well, when you purchase merchandise there it is only natural that they would give you an invoice.

The Court: No, strike it out.

Q. By Mr. Neukom: What is your best recollection of what happened?

A. Well, I go there and purchase my merchandise and they tell me what it is and give me the invoice.

The Court: Was that done in this particular instance?

The Witness: Certainly.

The Court: That is all.

Q. By Mr. Neukom: And by someone in the plant?

A. Yes, by the bookkeeper.

Q. And after you had received the invoice from the bookkeeper, what did you do about paying any other moneys?

A. Well, it was figured out how much I owed them.

Mr. McLaughlin: I move to strike that.

The Court: Who figured it out?

The Witness: Either Bill or Jack.

Q. By Mr. Neukom: How did they do it?

A. Just figured up what it amounted to and told me and I paid it.

Mr. McLaughlin: I move to strike because there is no statement as to who that party was in that conversation and if you are going to have conversation he should fix the names [99] of the parties there and who said it.

The Court: No, I think it goes to the weight of the testimony. It is not as certain as it could be if it were identified properly, but I believe it goes to the weight of it to be argued to the jury. Overruled and exception allowed. Proceed.

(Testimony of Emil J. Dvorak)

Mr. Neukom: I will offer now the last invoice in evidence.

The Court: Any objection, Mr. McLaughlin?

Mr. McLaughlin: Objected to on the ground that it is immaterial.

The Court: Overruled. In evidence.

The Clerk: That will be Government's Exhibit 20 in evidence.

(The document referred to was received in evidence and marked Government's Exhibit 20.)

[GOVERNMENT'S EXHIBIT NO. 20]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 10-31-1944

Sold to Emil Devorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
870	6.5	S/C	134	27½	36 85
		N/Y	129	26¼	33 86
		PL Trimming	29	25	7 25

870					77.96
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Pd					77.96
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[Stamped]: Paid AW

44235 Received By.....

Case No. 18367 Cr. vs. Shubin. Exhibit. Date 6/18/46. No. 20 Identification. Date 6/19/46. No. 20 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: The next document, Government's Exhibit 21 for identification, is offered in support of count 1, subdivision T.

I show you an invoice, a carbon copy, which bears serial No. 5252 dated July 10, 1945, from the Vernon Hotel and Restaurant Supply Company of merchandise sold to Emil Dvorak. Do you have a recollection after having looked at this instrument of where you received this from?

A. Yes, at the Vernon Hotel and Restaurant Supply Com- [100] pany.

Q. And will you relate the circumstances to the best of your recollection of what transpired when you received that?

A. Well, on this particular invoice this merchandise was put down in cure for me and I paid for it then but received it after it was smoked.

Q. I am asking you who gave you the invoice.

A. Well, the girl at the desk.

Q. A girl that you have seen many times there?

A. Yes, sir.

Q. Do you know her name?

A. No, sir, I don't.

Q. Well, can you give me a general description of her?

A. Well, she was a short girl, a very nice looking girl and I just don't recall her name at the present time.

Q. But you had seen her there in the three years you had been trading there. you had seen her more than a dozen times?

A. Lots of times.

Q. What does lots of times mean?

A. At least a dozen times.

(Testimony of Emil J. Dvorak)

Q. And she made out that invoice and gave it to you?

A. Yes.

Q. And then did you pay the \$108.10? [101]

A. Yes, sir.

Q. Which is the total price of the merchandise?

A. The total amount.

Q. And at that time do you recall whether or not you paid any sums of money in addition to the price per pound as is indicated on this invoice to one or either of the defendants here? A. Yes.

Q. To whom is it your best recollection that you paid such additional sum of money?

A. To either Jack or Bill.

Q. At the plant? A. At the plant.

Q. Now, relate to the jury—the item there is bellies. Is that beef or— A. It is pork.

Q. Pork bellies. The price is 21 cents. Did you pay any overage? A. Yes, I did.

Q. And how much per pound?

A. Seven cents per pound over.

Q. There is a check mark below that part and it says 172 pounds. What is that?

A. That is for curing and smoking.

Q. And you paid nothing in addition to that amount that [102] is indicated there? A. No.

Q. That was the charge for smoking? A. Yes.

Q. Below that is legs 210 at 27 cents. Is that pork legs? A. Yes.

Q. Did you pay to either Jack or Bill any additional sum per pound for those items? A. Yes, I did.

Q. How much is your best recollection?

A. Seven cents.

(Testimony of Emil J. Dvorak)

Q. Per pound? A. Yes.

Mr. Neukom: I would like to offer in evidence Government's Exhibit 21 for identification.

Mr. McLaughlin: It is objected to as being immaterial.
The Court: In evidence.

The Clerk: Government's Exhibit 21 received in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 21.)

[GOVERNMENT'S EXHIBIT NO. 21]

No. 5252

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Los Angeles 11, Calif., 7/10 1945

Sold to E Dvorak

Address.....

Total Points	Point Value	Item	Weight	Price	Amount
1204	7.0	Bellies	172	21	36 12
—	—	✓	172	04	6 88
1680	80	Legs	210	27	56 70
—	—	✓	210	04	8 40
<hr/>					<hr/>
2,884					108 10

P

[Stamped]: Paid P

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 21 Identification. Date 6/19/46. No. 21 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Emil J. Dvorak)

Q. By Mr. Neukom: Now, I show you an invoice which, your Honor, is offered in support of count 1, subparagraph 5, identified as 22, serial No. 45128. I ask you if you have ever seen this invoice which apparently bears the date of [103] 12/4/44. A. Yes.

Q. And where did you receive it?

A. At the Vernon Hotel and Restaurant Supply Company.

Q. To your best recollection who gave you this invoice? A. The girl at the desk.

Q. And she was the young lady you had seen there on several occasions?

A. Yes, sir, on several occasions.

Q. And she made out the invoice? A. Yes.

Q. You had nothing to do with making this invoice out yourself? A. No.

Q. And at the time you received this invoice or thereabouts, did you receive any merchandise?

A. Just what is on that invoice.

Q. I mean you received the meat as indicated here?

A. Yes.

Q. A total of \$116.13? A. Yes.

Q. Did you pay for that merchandise?

A. I paid cash, yes, sir.

Q. You paid cash for the merchandise. Now, did you pay [104] any additional sum over and above the total of this invoice to one or either of the defendants?

A. Yes, I did.

(Testimony of Emil J. Dvorak)

Q. To the best of your recollection to whom did you pay any additional sum per pound?

A. To either Jack or Bill.

Q. At the plant? A. At the plant.

Q. Decipher what those are.

A. New York shoulders.

Q. How much a pound did you pay overage for that to the best of your recollection?

A. Three cents per pound over.

Q. That was in 1944? A. Yes.

Q. What is the next item?

A. Short cut pork loins.

Q. How much in addition did you pay?

A. Five cents per pound over.

Q. What is the next item?

A. Fresh bellies, seven cents per pound over. There was nothing on the trimmings and seven cents per pound on the legs.

Q. That is the last item? A. Yes. [105]

Q. Pork legs. This was all pork? A. Yes.

Mr. Neukom: I offer in evidence Government's Exhibit 22 for identification.

Mr. McLaughlin: Objected to as immaterial.

The Court: Received in evidence.

The Clerk: Government's Exhibit 22 received in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 22.)

(Testimony of Emil J. Dvorak)

[GOVERNMENT'S EXHIBIT NO. 22]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Sold to Emel Devorak

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
		N/Y	172	26	44 72
975	6.5	S/C	150	27	40 50
		F Belley	64	21	13 44
		Pk Trim	34	22	7 48
185	5.0	Shd Pk Legs	37	27	9 999
<hr/>					<hr/>
1160					116 13

[Stamped]: Paid BU

45128

Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 22 Identification. Date 6/19/46. No. 22 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Mr. Neukom: As to Exhibits 20, 21 and 22, may we ask the same stipulation that the prices indicated opposite each respective item were the maximum prices permitted under the OPA as of the dates in question?

Mr. McLaughlin: Yes.

The Court: So understood.

(Testimony of Emil J. Dvorak)

Mr. Neukom: At this time will it be stipulated without stipulating as to the admissibility, that the various exhibits which we have used, carbon copies, the invoices, that they are carbon duplicate copies of the original invoices which are contained in folders as a representative group, I have two here on the table, which are the original documents or instruments from the Vernon Hotel and Restaurant Supply Company?

Mr. McLaughlin: Yes, I will so stipulated.

Mr. Neukom: Very well. We are not making any offer of [106] these but the proposition I think is that these are carbon copies of what the originals are which will later be offered. [107]

Q. Now, Mr. Dvorak—

Mr. McLaughlin: Mr. Neukom, may I check this last exhibit that you put in? I think your subdivision alleges that that invoice was dated August 10, 1945, and I do not think the invoice is dated that.

The Court: It is dated 12-4-44, Exhibit 22.

Mr. Neukom: The last one was 12-4-44. The one before that was July 10th.

Mr. McLaughlin: Yes; July 10th, not August 10th.

Mr. Neukom: Did I say "August 10th"?

The Court: No. July 10th, I have it.

Mr. Neukom: It probably says "on or about."

Mr. McLaughlin: And it should be July?

The Court: Yes. I have July 10, 1945.

Mr. Neukom: The invoice is July 10th.

The Court: Yes. All right; proceed.

Q. By Mr. Neukom: Now, in the approximate three years that you did business, from either the latter part

(Testimony of Emil J. Dvorak)

of 1942, as I understood your testimony, to the latter part of 1945—is that correct, that you did business with the defendants? A. Yes, sir.

Q. In buying meats?

The Court: Up to about six months ago, he testified yesterday. [108]

Mr. Neukom: Yes.

Q. Which, as I understand, was about the latter part of 1945? A. Yes, sir.

Q. During that period of time did you purchase other meats in addition to those items that have been reflected on the various exhibits that I have shown to you as a representative group? A. Yes.

Mr. McLaughlin: Objected to on the ground that it is immaterial and not covered by any counts in the indictment.

The Court: No; that is proper. Overruled. Exception noted.

Q. By Mr. Neukom: Now, did you buy shortcuts of pork at other times in addition to those which are reflected on the various exhibits that have been shown to you? A. Yes.

Mr. McLaughlin: The same objection.

The Court: Let the record show the objection was interposed before the witness answered; overruled, exception allowed. Proceed.

Q. By Mr. Neukom: Your answer is “yes” now?

A. Yes.

Q. And did you receive the merchandise that you so purchased? [109] A. Yes.

(Testimony of Emil J. Dvorak)

Q. And did you pay to one or either of these defendants at the times you received such shortcuts of pork loins a sum of money in addition to that set forth in the invoice? A. Yes.

Mr. McLaughlin: Objected to—just a minute. Mr. Dvorak, don't answer until I have a chance to object. I object on the ground that it is immaterial and calls for a conclusion of the witness and is not the best evidence.

The Court: Repeat the question, please.

(Question read by the reporter.)

The Court: You mean in the various invoices?

Mr. Neukom: In the various invoices. May I reframe it this way, your Honor?

Q. You have testified, as I understand it, that you purchased merchandise from these defendants at ratios of about four or five times a week over the period of three years; is that correct? A. Yes.

Q. And all of those dealings are not covered by the invoices that have been shown to you, are they?

A. No.

Q. Did you at any time when you purchased other pork loins—was there ever a time that you purchased pork loins—may I reframe it?—From the defendants that you paid only [110] the amount which was indicated in the invoice? A. Yes.

Mr. McLaughlin: Objected to—

The Court: Now, wait a minute. Strike out the answer.

Mr. McLaughlin: Objected to on the ground that it is immaterial and not the best evidence and calling for the conclusion of the witness.

(Testimony of Emil J. Dvorak)

The Court: Yes; it is too sweeping. There is no chance for the defendants to cross-examine on these general conclusions of that kind. I will sustain the objection of the defense. All right; proceed.

Mr. Neukom: We were trying, your Honor, to avoid having to go over each and every single transaction, which, as you can appreciate, over three years' time, at five times a week, would make it almost endless here.

The Court: But the eyes of justice do not look at shortcuts in order to accomplish the object of a saving of time to counsel.

Q. By Mr. Neukom: Were you acquainted at the times in question, in following the industry, with what the ceiling price was from time to time? A. Yes.

Q. And when you bought merchandise from time to time you were aware of the ceiling prices as of the dates in question, is that correct? [111] A. Yes.

Q. And you have been in the meat business during all of the OPA regulations, haven't you? A. Yes.

Q. Did you ever buy any loins of pork from the defendants at which time you did not pay a sum of money over the ceiling price?

Mr. McLaughlin: Objected to on the ground that it is immaterial, too broad and sweeping, calling for a conclusion of the witness, and the witness is not qualified as an expert.

Mr. Neukom: Now, on the qualifications, your Honor, here is a man who has been in this business ever since the war—I think that is the testimony—and he has qualified himself by stating that he knew what the ceilings were from date to date. It goes more to the

(Testimony of Emil J. Dvorak)

weight of his testimony. A man can say he knows what the ceiling was, the same as a person knows what the ceiling is on gasoline from day to day; and if we go into a station during the war, we knew that gasoline may sell for 20 cents, and we have no invoices, we will say, and every time we go in there as an individual, without anyone with us, if we had to pay 40 cents for that gasoline we know whether or not there was ever an exception to that rule, don't we? And yet, we might not be in a position to check up each and every invoice. A man could know that factor, I think, and give a very intelligent answer. Cross- [112] examination can bring out whether or not there were exceptions to that.

The Court: The rule of evidence is clear that the Government is not restricted to the various allegations alleging the offense set forth in the indictment, but may show other similar transactions to show a course of conduct, and also knowledge on the part of the defendants of the violation of the law. But I do not believe that it is proper to ask such a sweeping, general question. I think it is unfair to the defendants.

Mr. Neukom: Very well, your Honor.

The Court: And I will sustain the objection of the defense.

Mr. Neukom: That is all for this witness.

The Court: Cross-examine.

Mr. McLaughlin: Do counsel for the Government or your Honor have any objection if I sit over here? I have difficulty hearing.

Mr. Neukom: Do you want to sit here?

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: No. I can sit here, Mr. Neukom. I am sorry.

The Court: Mr. McLaughlin, I think that at the end of that jury box is a rest, if you care to use it. Mr. Neukom will show it to you.

Mr. McLaughlin: Well, it may be far away. We will fix [113] it up here. I don't think I need that.

Mr. Neukom: Mr. McLaughlin, when I was referring to these awhile ago—which is always bad—as to the original invoices, may they receive some number for identification?

The Court: Mark them for identification, Mr. Cross.

Mr. Neukom: We will reserve that right.

Cross-Examination

By Mr. McLaughlin:

Q. Mr. Dvorak, you still are operating a retail meat market at the place you designated? A. Yes, sir.

Q. And you have operated such a market since a date prior to November, 1942, continuously, haven't you?

A. Yes, sir.

Q. Prior to the time you opened that meat market you worked for the defendants Shubins, didn't you?

A. Yes, sir.

Q. And you testified that in the fall of 1942 that you had a discussion with Mr. Shubin at your place of business. Do you remember that testimony?

A. Yes, sir.

Q. Prior to the time that he came to your place of business you had purchased some meat which the Shubins had had delivered to your place of business, hadn't you?

A. Yes, sir. [114]

(Testimony of Emil J. Dvorak)

Q. And your butcher, who was there, paid them what you believed was more than the ceiling price?

A. Yes, sir.

Q. And you called Mr. Shubin on the telephone and told him that there had been an overcharge of \$7.50?

A. Yes, sir.

Q. And Mr. Shubin immediately brought you the money out and he paid you \$15.00 instead of \$7.50, didn't he?

A. Yes, sir.

Q. And at that time you had a discussion with Mr. Shubin regarding the difficulty of obtaining meat in the meat market, didn't you?

A. Yes, sir.

Q. At that time you were purchasing meat from other people than the Vernon Hotel & Restaurant Supply Company, weren't you?

A. Yes.

Q. Several other concerns?

A. Yes.

Q. And you were having difficulty at all of those places in getting meat?

A. Yes.

Q. And Mr. Shubin said to you, after you told him of your difficulties, in substance, if you want to stay in business [115] you got to play ball these days: is that what he said?

A. Yes.

Q. Did Mr. Shubin tell you at that time that you had to pay him any price in excess of the ceiling price?

A. No.

Q. Now, thereafter you came to Mr. Shubin's place of business. I think the next day, and you told him that you were unable to get any meat from anybody, didn't you?

A. Yes.

Q. And Mr. Shubin gave you a truck load of meat, didn't he, or told you that you could take it?

A. Yes.

(Testimony of Emil J. Dvorak)

Q. And did he tell you that you had to pay anything over ceiling? A. Not at that time; no, sir.

Q. From then on, when you purchased meat, you would see Mr. Shubin or Mr. Kissel? A. Yes.

Q. As you testified? A. Yes.

Q. Now, can you tell the court and the jury of any particular time when Mr. Shubin or Mr. Kissel asked you to pay them any money over ceiling, when they requested it?

The Witness: Would you ask me that again?

The Court: The reporter will repeat the question[116]
(Question read by the reporter.)

A. Well, I can't pick out any one certain date or certain amount, but there was a set figure that I had to pay.

Q. By Mr. McLaughlin: Well, what I am trying to get at is just when that discussion took place. Now, thus far, there is nothing in the record on it and you have to help us now, if you can, and tell us when there was such a discussion.

A. Well, that is a long time to remember word for word.

Q. Well, you testified when Mr. Shubin came out and paid you the money, which you said had been an overcharge, that you had a discussion. He did not ask you for any overcharges then, did he? A. No, sir.

Q. All right. Now, you must have in your mind some time when Mr. Shubin or Mr. Kissel asked you or told you that if you wanted to buy meat from them you had to pay them in excess of the ceiling.

The Court: When you say "Shubin," there are two.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: I am sorry. Mr. Shubin or Mr. Kissel.

A. Well, I can't pick out how much was stated at that time, but I—

Mr. Neukom: Let the witness explain.

Mr. McLaughlin: We haven't any time yet. Let us get a time first.

A. Well, when I started back in business with them [117] they come to some set figure that I had to pay.

Q. Mr. Dvorak, I am trying to get, as near as you can fix, a time and place where either of the Shubins or Mr. Kissel were present when it was told to you that you had to pay over ceiling. Now, you try and help us fix that time and place, and then we can go from there on as to what they said and what you said.

A. Well, I would say the first of '43, to be more sure of it, or the last part of '42.

Q. How long after the time that Mr. Shubin came to your place of business to repay you the \$7.50?

A. Well, right at that time I quit buying from them for a short spell in there, and then I went back of my own accord to purchase meat from them.

Q. You called on them?

A. I called on them; yes, sir.

Q. All right. And you saw who? A. Bill.

Q. That was at the plant? A. At the plant.

Q. Will you state what you said and what Bill said, as near as you can state it?

A. Well, I told him—well, prior to that time, while he was at the shop he told me that I didn't—

(Testimony of Emil J. Dvorak)

Q. Wait now. We want this discussion. If there was [118] a prior one, we will take it. Was there a prior one?

A. Well, this is in connection with it. I just want to relate the things that brought me there.

Q. You had a discussion with Mr. Shubin before you went to his plant, then?

A. Yes. He told me I didn't have to buy meat from him or—

Q. We have to get the place and the parties. Before you went to the plant, you had another discussion with Mr. Shubin?

A. Well, that was the same one. A little of it is coming back to me. He told me that I didn't have to buy from him but he always thought quite a little bit of me and didn't claim—he didn't want me to lose my business by not having merchandise; and he told me if I ever felt different about it, that I could always buy if I wanted to. So I went back there of my own accord to purchase meat.

Q. All right. Then you went to the plant. Have you stated everything that was said at the discussion you have just related? A. As near as I can remember.

Q. You went to the plant and what was said then?

A. Well, I can't recall the exact words that were mentioned at that time, but no doubt, naturally, I come there for merchandise.

Q. Well, Mr. Dvorak, if you can't recall any words, [119] nobody on earth can make you testify to that, and you shouldn't. So, when you can't recall, say you can't. But if there is any part of a conversation you can recall, you tell the jury and the court what was said.

(Testimony of Emil J. Dvorak)

A. Well, I want to stick to the truth as much as I can. I don't want to guess at something. I can't suck something out of my thumb if I don't know.

Q. Well, do you want the jury—

A. I just don't recall.

Q. All right; that is all right. Now, do you have any recollection of any other discussions, then, at which you were told by any of the defendants that you had to pay over ceiling, leaving the one that you said you did not recall?

If you had, say "yes" and then we will fix the time and place? A. Yes.

Q. All right. Now, fix the time and the place.

A. Well, it must have been at that time or shortly thereafter that there was some set price fixed.

Q. Well, now, wait. I want to get the time and the place and the parties, and then we will get to the discussion. You say that—

A. Well, dates I do not remember.

Q. Now, you have already testified that you did not recall what was said at the discussion that you had when you [120] first came to the plant after this lapse of time that you were not doing business with them; that is correct, isn't it? A. Yes.

Q. So it was not at that discussion?

A. Well, it must not have been, then.

Q. All right. Did you have another discussion that you recall where you discussed with them the paying of over ceiling? A. I can't recall that I did.

Q. Mr. Dvorak, during the time that the war was going on meats were rationed and it was necessary for

(Testimony of Emil J. Dvorak)

people to use red points in the purchasing of the meat; you recall that? A. Yes, sir.

Q. And do you recall also that during that period of time the lockers and the refrigerators were frequently filled with meat in Los Angeles, and the only obstacle to purchasing meats was lack of points?

Mr. Neukom: Your Honor, just a moment. That is not proper as a matter of cross examination.

Mr. McLaughlin: It is preliminary, your Honor.

Mr. Neukom: I think the court and the jury will take judicial notice of the point system and the difficulty of the point system.

The Court: I do not suppose the jury will take judicial notice. [121]

Mr. Neukom: Well, I mean I assume the court would instruct the jury.

The Court: Counsel assures me it is preliminary.

Mr. Neukom: Very well.

The Court: And on that statement, I will permit it. But it is not proper cross examination if it were just standing alone.

Mr. McLaughlin: That is right, your Honor; that is right.

The Court: Proceed.

Mr. McLaughlin: The next question will be proper.

Will you read the question, please?

(Question read by the reporter.)

A. Yes.

Q. And while the lockers were filled with meats did you pay over ceiling for meats?

(Testimony of Emil J. Dvorak)

Mr. Neukom: Now, your Honor, I object to that because there isn't a proper foundation. We had the war going on and it is still going on.

The Court: I do not see the connection, but I will permit counsel to continue and connect it up. Can you answer that?

The Witness: Would you kindly repeat that question? (Question read by the reporter.)

The Court: If you know. [122] A. Yes.

Q. By Mr. McLaughlin: And were those instances where you paid over the ceiling for meats that you also paid the regular red points? A. Yes.

Q. Well, were you solicited by these packing houses and wholesalers to purchase meats when they had an excess supply on hand? A. No, sir.

Q. You never were?

A. Well, just the big packers, Wilson.

Q. You were solicited by packers?

A. Yes. I thought you were referring to the Vernon Hotel & Restaurant Supply Company.

Q. Do you know whether during that period that the war was going on there was an excess supply of meat here and that meat was easily available to anyone who had the points most of the time?

A. It was available to those that had the points.

Q. Most all the time?

A. Most all the time; yes, sir.

Q. Before you testified in this case you had been contacted by representatives of the Office of Price Administration? A. Yes, sir. [123]

Q. Regarding testimony that you were to give in this case? A. Yes, sir.

(Testimony of Emil J. Dvorak)

Q. And was one of those representatives Mr. Wills, the gentleman sitting behind me?

A. No, sir.

Q. Who were the representatives who contacted you?

A. The representatives that contacted me was Larry Taylor and another gentleman whose name I can't recall.

Q. Well, will you state approximately when they first contacted you?

A. They contacted me at least a month previously to the time I quit trading at the Restaurant Supply Company.

Q. You mean the Vernon Hotel and Restaurant Supply Company?

A. Yes, the Vernon Hotel and Restaurant Supply Company.

Q. Can you tell me what year that was?

A. It was in 1945.

Q. In 1945. Would you say it was in the early part or the latter part? A. The latter part.

Q. And they came to your home, did they not?

A. To the shop first.

Q. They came first to the shop and then they came to your home? [124] A. Yes.

Q. Now, the first thing they did was to make a claim against you that you had been dealing in red points?

A. Yes, sir.

Q. And then they told you that they were going to have you arrested if you didn't testify on the Vernon Hotel and Restaurant Supply Company, give them information, isn't that right?

A. Not those exact words.

(Testimony of Emil J. Dvorak)

Q. Well, you tell us what they told you.

A. Well, at the time I was purchasing meat from the Shubin boys, I was also buying meat on my name for a fellow by the name of Perk.

Q. Mr. Perk? A. Yes.

Q. You bought and then you sold to Mr. Perk as a wholesaler yourself?

A. Well, he just bought it on my name. Sometimes I was there and paid for it and sometimes he was there and paid for it, but the boys wouldn't sell to him so he bought it under my name in my dealings with them.

Q. Now, Mr. Dvorak, what I want to get—we don't need to go into the background because you are not on trial here. I want to get the discussion.

Mr. Neukom: Just a moment. You asked for the conversa- [125] tion. The witness is endeavoring to give an explanation of what was said to the OPA agent. I think he has a right, your Honor.

Q. By Mr. McLaughlin: Mr. Dvorak, stick to the discussion you had with the OPA agents. If I interrupted you in that discussion, I want to apologize.

A. This all will be in connection with that.

Q. Tell us what you said and what they said. Is that what you are telling us now?

A. I am just coming to the point where in my dealings with Mr. Perk sometimes I would pay in red points to the boys and sometimes when he was there he would pay them. Then on a couple of occasions I paid for the points and then he would give me the points back.

Mr. McLaughlin: Now, your Honor, I submit I asked the witness for a conversation and he is going into—

(Testimony of Emil J. Dvorak)

The Court: That is right. Give the conversation.

The Witness: I am relating the beginning of this here investigation.

The Court: Counsel just asked for the conversation.

Q. By Mr. McLaughlin: Now, Mr. Dvorak, you can remember now when these two gentlemen from the OPA called on you and you can recall that they said certain things to you and you said certain things to them. Let us start right there and let us assume that everybody knows what happened be- [126] *before*, if that is material. Just tell us what they said about your giving testimony or telling them about the Shubins.

A. Well, they didn't say I had to testify or anything like that.

Q. What did they say?

A. They came to me on account of having phony points in my possession and that was the beginning of the investigation and from there on they got this other information out of me.

Q. Well, Mr. Dvorak, you testified that you told them certain things but you haven't testified as to what they said to you that caused you to tell them these things.

A. Well, it was over this point transaction that they came over to see me about.

Q. Let me help you. Isn't it true that they told you that they would have you arrested and put in jail unless you gave them some information about the boys you were dealing with? Did they say that or not?

A. No, they did not say that.

Q. All right. Now, what did they say?

A. Well, in this here transaction, in this here deal on the points, I asked them not to take advantage of me

(Testimony of Emil J. Dvorak)

being in the position I was and they were questioning me on this here business while they were still working on me on the point deal. [127]

Q. Well, you gave them a false statement on your point deal, didn't you?

Mr. Neukom: Your Honor, I object to that.

The Court: Sustained.

The Witness: I told the truth.

The Court: Just a moment. Sustained. Let us try one case at a time.

Q. By Mr. McLaughlin: No criminal complaint was ever filed against you, was there? A. No, sir.

Q. Now, did you maintain any books or records with reference to the moneys which you testified that you paid Jack Kissel and Bill Shubin? A. No, sir.

Q. You never maintained any record of any kind?

A. No, sir.

Q. Have you ever made up any summary of the moneys that you paid them since paying them?

A. Yes, sir.

Q. Did you say yes or no? A. Yes, sir.

Q. And when did you do that?

A. When I was questioned about the point business.

Q. That is by the OPA?

A. They were FBI agents. [128]

Q. Well, what were their names?

A. Larry Taylor and I just can't recall the other fellow's name.

Q. Did they take you to their office?

A. Yes, sir.

Q. And was that at 1130 something south Broadway?

A. Yes, sir.

(Testimony of Emil J. Dvorak)

Mr. Neukom: I think, your Honor—

Mr. McLaughlin: Yes, I think we will stipulate that they were OPA agents.

Mr. Neukom: Yes.

Q. By Mr. McLaughlin: Did you have any records or anything at that time from which you gave any summaries of the money you paid them? A. No, sir.

Q. You just made it up out of your head?

A. What I didn't make up they helped me.

Q. Is there anything on which you predicate your information as to the specific cents per pound that you paid either Mr. Shubin or Mr. Kissel on any occasion as you have testified you paid them?

A. I cannot truthfully say how much at any one time that I paid.

Q. Well, that is what I am driving at. How do you figure it was so much per pound then? [129]

A. Well, it was approximately two cents, three cents to seven cents per pound over the ceiling.

Q. Do they ever give you a quotation or a listing as to the amount over the ceiling? A. No, sir.

Q. Either orally or in writing? A. No, sir.

Mr. McLaughlin: That is all, Mr. Dvorak.

The Court: Anything further?

Mr. Neukom: Yes, your Honor.

Redirect Examination

By Mr. Neukom:

Q. You were asked a question by Mr. McLaughlin with regard to some summaries that you made up computing the overage that you had paid. Is that correct?

A. Yes, sir.

(Testimony of Emil J. Dvorak)

Q. And did you have before you at that time all of your accessible invoices? A. No, sir.

Q. Did you have any of your invoices before you?

A. At the time of the investigation?

Q. Yes. A. No, sir.

Q. How did you make up the summaries?

A. Well, just an estimate, just a rough estimate of [130] what I thought I paid.

Q. Now, at that time when you were making up your summaries did you take into consideration the fact that you had been purchasing meat from the boys—do you refer to the boys as the defendants here?

A. Yes, sir.

Q. Did you take into consideration the fact that you were purchasing meat from four to five times a week?

Mr. McLaughlin: That is objected to as being leading, argumentative, and not proper redirect examination.

Mr. Neukom: Well, I will reframe it.

Q. Did you talk or discuss that with the agents? Did you advise the agents that you had been buying meat four to five times a week?

A. I don't recall telling them that I bought from them four or five times a week. They knew I bought from them, though.

Q. Now, when the agent Mr. Taylor was talking to you about the Mr. Perk transaction that has been brought out by counsel, in the latter part of 1945 at your shop, in discussing with you irregularities, any meat points, did you at that time discuss and explain to the agent as to whether or not you had been paying an overcharge to these defendants? A. No, sir.

(Testimony of Emil J. Dvorak)

Mr. McLaughlin: That is objected to as being leading and [131] suggestive and not proper redirect examination.

The Court: Well, it is proper redirect examination because the matter was brought out on cross examination, but it is slightly leading.

Q. By Mr. Neukom: Well, I will reframe it. When you were discussing the matters pertaining to your point irregularities, during the course of that discussion with Mr. Taylor either in your shop or at his office, did you tell him anything at that time about paying over the ceiling prices for meat you obtained from the defendants?

A. Yes, sir.

Mr. McLaughlin: That is objected to as being immaterial and leading. I move to strike his answer.

The Court: Overruled.

Q. By Mr. Neukom: What is your answer?

A. Yes, sir.

Q. And what did you tell Mr. Taylor?

Mr. McLaughlin: I object to that on the ground that it is leading and suggestive and hearsay so far as these defendants are concerned. They were not present.

The Court: It is not leading. "What did you say?" It is not suggestive when the question is "What did you say." There is nothing suggestive in that.

Mr. McLaughlin: It is hearsay.

The Court: Now, with reference to the question of hear- [132] say it seems to me that has been waived by the defense because the defense opened up the question. Proceed.

Mr. McLaughlin: Your Honor, might I be heard on that?

(Testimony of Emil J. Dvorak)

The Court: Yes.

Mr. McLaughlin: Your Honor, I did not ask anything, any language or any discussion that was had. I asked what was done and there was no testimony that came out here to my recollection as to what he told these gentlemen at all. The only thing I was going into, I was asking him what records he used to give the information. Now, he said he had no records and that is what I was interested in and I submit that does not give the government the right to open up the field of hearsay here that my parties were not present at.

Mr. Neukom: Your Honor, counsel was endeavoring to castigate this witness by showing prejudice and he was trying to explain this, I mean the witness was endeavoring to give an explanation of the conversation and counsel would interrupt him. Now, I think as long as he is endeavoring to bring out a portion of the investigation that this man can also testify to the full conversation, that he has a right and that counsel brought it on himself by his mode of trying to cross examine this man and I think we have a right to allow this witness to say what he did tell them that caused the government to use him as a witness or caused this proceeding to go forward from that point there and not leave it in the air. [133]

The Court: Well, I don't think it is very important either way. I will sustain the objection. Proceed. There is no dispute but that the proceedings are here.

Mr. Neukom: Very well.

Q. You recall the question asked you when you told Mr. Shubin or found out from your butcher that he had charged you \$7.50 too much on some meat that was given

(Testimony of Emil J. Dvorak)

to you that was bought in the latter part of 1942. He came over to your shop, didn't he?

A. Yes. He delivered it himself.

Q. He delivered it? A. Yes, sir.

Q. And then he paid you back \$15?

A. Yes, sir.

Q. Of any of the money you paid Mr. Shubin since then has he ever paid you back any of the overcharge?

A. No.

Mr. McLaughlin: Just a moment. I didn't ask that question. It is not proper redirect examination. It is too broad and indefinite.

The Court: No, the question is all right because I am assuming it is limited to the exhibits which have been introduced where the witness testified that he made over-the-ceiling payments. Now, limited to that, the question is entirely proper, and not to any other transaction. [134]

Q. By Mr. Neukom: Limited to these particular invoices that I showed you one by one that you have testified to, did Mr. Shubin ever return any of the money to you? A. No, sir.

Q. Did any of the defendants return it to you?

A. No, sir.

Q. Counsel asked you this question, that when the lockers were full during the war, he asked you if you ever paid over-the-ceiling prices for meat and as I recall your answer was yes. A. Yes.

Q. To whom did you mean that you paid over-the-ceiling prices? A. To either Jack or Bill.

Mr. Neukom: That is all.

Mr. McLaughlin: No questions.

The Court: That is all, thank you.

(Witness excused.)

Mr. Neukom: The witness may be excused unless counsel desires or the court wishes to retain him.

Mr. McLaughlin: He can be excused.

GEORGE F. VEUHOFF

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: State your name. [135]

The Witness: George F. Veuhoff.

Direct Examination

By Mr. Neukom:

Q. Your name is Mr. Veuhoff? A. Yes, sir.

Q. And where are you now residing?

A. Perris, California.

The Court: That is near Riverside, is it not?

The Witness: Yes.

Q. By Mr. Neukom: Are you acquainted with the defendants in this case? A. Yes, sir.

Q. All of them? A. Yes.

Q. Have you had business transactions with them?

A. Yes, sir.

Q. At a time when you were in the meat business?

A. Yes, sir.

Q. And was that in 1945?

A. From the 1st of January approximately to the end of March, 1945.

Q. And you had a meat market where at that time?

A. In El Monte.

(Testimony of George F. Veuhoff)

Mr. Neukom: Now, from here on I am going into the exhibits, your Honor. [136]

The Court: Ladies and gentlemen, we will take our regular morning recess and you will remember the admonition I have heretofore given you. You will not discuss this matter among yourselves nor permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court. We will take a ten-minute recess.

(Short recess.)

The Court: Stipulate that the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Stipulate that the defendants are in court?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

Q. By Mr. Neukom: Now, Mr. Veuhoff, you have testified that in 1945 you had a butcher shop I believe in El Monte. Is that true? A. Yes, sir.

Q. And were you at that time also conducting or managing another butcher shop for your brother who I believe was in the service? Is that correct?

A. No, it was just a friend.

Q. Oh, for a friend. Now, at that time you were pur- [137] chasing meat from the defendants here?

A. In January of 1945, yes.

Q. And for about how many months?

A. Approximately three months.

(Testimony of George F. Veuhoff)

Mr. Neukom: I have had marked, but may the record show that five invoices have been marked from 25 through 29 for identification, and counsel has indicated that as to those invoices the same stipulation will be had, namely that the price per pound as indicated on each invoice is the maximum price allowed at the time in question for the items designated pursuant to the regulations of the OPA.

Mr. McLaughlin: So stipulated.

Q. By Mr. Neukom: And your market was known as the George Market? A. George's Market.

Q. That is your first name?

A. Could I make a comment before you start? You said I was running a market for somebody at that time. I wasn't. It was before that time.

Q. Before that time?

A. Way before that time. I was in partners with another fellow in a market.

Q. Now, at the time in question were you the sole owner of this market?

A. George's Market, yes. [138]

Q. Very well. Now, I am showing you Government's Exhibit 25 for identification, serial No. 48245, dated 3/20/45, from the Vernon Hotel and Restaurant Supply Company and for all these other invoices it will be the same except as to dates and items there, I mean from the same company.

Do you recall after having looked at this invoice of having purchased the merchandise, the veal that is indicated there? A. Yes, sir.

(Testimony of George F. Veuhoff)

Q. And from whom is it your best recollection that you purchased this merchandise?

A. Well, I paid the girl like it is marked there and the overcharges were to Jack or Bill.

Q. Now, you say the girl. You mean the girl at the Vernon Hotel and Restaurant Supply Company?

A. The one in the office, yes, sir.

Q. And did you receive the veal here?

A. Yes, sir.

Q. What does the B veal mean?

A. It is just B veal, it is the grade.

Q. Grade B? A. Yes, sir.

Q. I mean does meat have grade A and grade B?

A. Grade B, C and double CC.

Q. Well, now, at the time in question you paid the [139] \$36.96 to the girl. Is that correct? A. Yes.

Q. Now, I note on the reverse side here that there are some pencil figures. Do you recall having made that or was that made shortly after the transaction in question?

A. I put that on there so I wouldn't forget the overcharge, probably as soon as I left there or before I would forget it. It is seven cents over on B veal.

Q. Seven cents over on B veal. Seven cents what?

A. Seven cents per pound.

Q. And to whom is it your best recollection that you paid that overcharge? A. To Bill or Jack.

Q. What is the total amount of that overcharge that you paid? A. \$12.32.

Q. Did you pay that by cash or check?

A. Cash.

(Testimony of George F. Veuhoff)

Q. Will you relate the circumstances, the procedure that was followed?

A. I would get my meat and put it in the truck and then go in and get the bill and pay the girl and they figured the overcharge some way. I could never understand it, and then I would just pay the cash.

Mr. McLaughlin: I move to strike beginning with the [140] words "They would figure the overcharge some way and I could never understand it and I would just pay the cash," on the ground that whoever did it and what was done can be best shown by testimony as to what was said and done.

The Court: That is correct. It is a conclusion of the witness that he never understood it.

Q. By Mr. Neukom: What was done?

A. Bill would add it on the adding machine and then give me the total amount of the overcharge.

Q. Would he show you what it was? A. Yes.

Q. And then what did you do?

A. Pay him the cash.

Q. And then you would go off with your merchandise?

A. Yes.

Mr. Neukom: I would like to offer this in evidence. May I for the purpose of your Honor's record state that I offer the last government Exhibit 25 in support of count 11?

Mr. McLaughlin: Just a moment, Mr. Neukom. This is one of the sales transactions?

Mr. Neukom: Yes.

Mr. McLaughlin: Well, the only objection is the immateriality, your Honor.

The Court: All right. Admitted in evidence.

The Clerk: Government's Exhibit 25 admitted into evi- [141] dence.

(The document referred to was received in evidence and marked Government's Exhibit No. 25.)

[GOVERNMENT'S EXHIBIT NO. 25]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 3-20 1945

Sold to Georges Mkt

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
634	36	B Veal	176	.21	36.96

[Stamped]: Paid A

48245 Received By.....

[Written on Reverse Side]:

176

7

—

1232 over

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 25 Identification. Date 6/19/46. No. 25 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946 Paul P. O'Brien, Clerk.

(Testimony of George F. Veuhoff)

Q. By Mr. Neukom: When you refer to Bill who do you mean? A. The one on my left.

Q. You mean Bill Shubin? A. Yes.

Q. Now, I am showing you an invoice which is Exhibit 26, identified and offered in support of count 30, which bears serial No. 47374. I will ask you as of the date in question, February 14, 1945, you purchased the merchandise that is indicated on that invoice.

A. Yes, sir.

Q. And from whom?

A. I paid the bill to the girl.

Q. You mean the girl at the place? A. Yes, sir.

Q. And it says here "C beef" and a total of 1085 pounds at 18 $\frac{1}{4}$ cents a pound, total amount \$198.01. Did you pay any overcharge at the time you received that merchandise? Just answer that question yes or no.

A. Yes, sir.

Mr. McLaughlin: Well, I think, your Honor, I don't want to be too technical, but when he says "pay any overcharge," [142] that is a conclusion and I think the question should be "Did you pay any money in addition."

The Court: That is right.

Mr. Neukom: Very well.

Q. Did you pay any moneys in addition to the invoice prices there? A. Yes, sir.

Q. How much was the total amount that you paid? Now, I note there are some figures on the back. Would that help you?

A. Yes. This one does. 3 $\frac{3}{4}$ cents over a pound.

(Testimony of George F. Veuhoff)

Q. Those were figures that you placed on there?

A. For my own use.

Q. For your own use? A. Yes, sir.

Q. How much was the total amount that was paid overcharge for that particular merchandise?

A. The figure shows \$40.68.

Q. Is that your best recollection of what you paid?

A. It is right here.

Q. It isn't what is there, but is it your recollection?

A. Yes, sir.

Q. After having looked at that? A. Yes, sir.

Q. That is correct? [143] A. Yes, sir.

Q. And who did you pay that to?

A. To Bill or Jack.

Q. At the plant? A. Yes, sir, in the office.

Q. And was that paid by check or how?

A. By cash.

Q. Did you get a receipt for it? A. No, sir.

Mr. Neukom: I would like to offer in evidence Government's Exhibit 26.

Mr. McLaughlin: It is immaterial.

The Court: In evidence.

The Clerk: Government's Exhibit 26 received in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 26.)

[GOVERNMENT'S EXHIBIT NO. 26]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 2-14 1945

Sold to Georges Mkt

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
5317	4.9	C Beef	1085	18¼	198 01

Pd

[Stamped]: Paid AW

47374 Received By.....

[Written]:

32.55	80
	90
	<hr/>
	170

[Written on Reverse Side]:

271	
¾ x 1085	
813	211
	5
1085	650
3¾	1030
<hr/>	8026
3255	3240
813	2000
<hr/>	<hr/>
4068	36546

(Testimony of George F. Veuhoff)

1085

$3\frac{1}{4}$

3255

271

35.26

Case No. 18367 Cr. U. S. A. vs. Shubin. Gov. Exhibit. Date No. 26 Identification. Date 6/19/46. No. 26 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross. Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: Now, you have testified that you also made notations on some of these invoices, I believe, for your own records. Did you keep a record independent of the invoice price as to any overcharge that you paid as you were going along in business?

A. No, sir.

Q. What?

A. No, sir, just on the books that way.

Q. I mean in your books. [144] A. Yes, sir.

Q. But you did keep a record of any moneys you paid over and above the invoice price?

A. I would just add it on to the total bill.

Q. I see, and that was for your own records?

A. Yes, sir.

Q. Now, I show you Government's Exhibit 27 for identification, offered in support of count 31, invoice No.

(Testimony of George F. Veuhoff)

47348, and ask you did you purchase the merchandise that is indicated there. A. Yes.

Q. From the defendants here? A. Yes, sir.

Q. You read those to me. You understand those symbols better than I do.

A. 691 pounds double C beef and 253 pounds of C beef.

Q. Now, you paid the invoice price to whom?

A. The girl.

The Court: What is C beef?

The Witness: C beef.

Q. By Mr. Neukom: What is that?

A. That is third grade.

Q. And did you pay the invoice price to the girl?

A. Yes, sir.

Q. And did you pay any other money to any of the de- [145] fendants at the time you received that merchandise? A. Yes, sir.

Q. To whom is it your best recollection that you paid?

A. It could be one or the other, Bill or Jack.

Q. Have you anything by looking at the figures that have been placed upon that invoice, any way of knowing how much you paid as a total sum for that merchandise?

A. There is just some writing on the back. We used this as a pad, but it would be 3 cents or more.

Mr. McLaughlin: Mr. Neukom, I think you asked the witness before if he made that notation right after the purchase. I don't think you have asked him that question here.

(Testimony of George F. Veuhoff)

Mr. Neukom: No.

Q. Did you make the notations on the foreside of that that are in pencil there and which are not carbon copies shortly after the purchase?

A. Well, I have some writing on here but I can't figure it out right quick what it is.

Q. Well, did you sometimes use these invoices to make other computations with respect to the business?

A. Yes, sir. That was in the shop and we used it as a pad. Sometimes they write some figures on there.

Q. And at times did you also put the amount per pound that you were paying overcharge on certain of the invoices? A. At times but not all of them. [146]

Q. Well, on this particular invoice do you have any figures placed on there that help your recollection—just answer yes or no—as to what amounts that you paid over the indicated price per pound?

A. There might be, but I can't remember what it would be.

Q. You can't remember what it would be?

A. No, sir.

Q. Well, do you have a recollection then as of the date in question how much per pound, approximately how much per pound that you paid in moneys above what is the invoice prices per pound?

A. Three cents.

Mr. McLaughlin: Well, just a moment. I think that calls for a yes or no answer first. Personal recollection without looking at the sheet?

The Witness: Yes.

Q. By Mr. Neukom: And what is your recollection per pound? A. Three cents or more.

(Testimony of George F. Veuhofi)

Q. And who did you pay that to?

A. Jack or Bill.

Mr. Neukom: I would like to offer in evidence Government's Exhibit 27.

The Court: In evidence [147]

The Clerk: Government's Exhibit 27 received in evidence.

(The document referred to was received in evidence and marked Government's Exhibit No. 27.)

[GOVERNMENT'S EXHIBIT NO. 27]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 2-13 1945

Sold to George's Mkt

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
1934	2.8	C C Beef	691	15½	107 11
1539	4.9	C Beef	253	18½	46-17

[Written]: ———

944

3173	153 28
------	--------

Pd

[Stamped]: Paid AW

47348 Received By.....

(Testimony of George F. Veuhoff)

[Written]:

\$27.32

176

253

429

170

3

510

1239

1749

[Written on Reverse Side]:

1545

100

1445

691

176

515

22

1030

1030

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 27 Identification. Date 6/19/46. No. 27 in Evidence. Clerk. U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

The Court: What count does that pertain to?

Mr. Neukom: Count 31, your Honor.

Q. Do I understand that some of the writings on the back of some of these invoices have no relation to the incident in question? A. Yes, sir.

Q. Can you just explain that briefly?

(Testimony of George F. Veuhoff)

A. Some of it is in my writing and some of it is in my wife's writing that she done at the store. We used it for a pad or something.

Q. All of these invoices cover your butcher shop?

A. Yes, my butcher shop.

Q. And your wife assists you? A. Yes, sir.

Q. I will show you now Exhibit 28 for identification offered in support of count 32, serial No. 46740, indicating the purchase of merchandise meats on January 26, 1945. Did you purchase that merchandise from the defendants?

A. From the Vernon Hotel and Restaurant Supply Company.

Q. Well, is that from the defendants here?

A. Yes, sir. [148]

Q. And will you relate what the first item is?

A. 424 pounds of hams, skinned hams, and 124 pounds of bacon.

Q. And the hams are indicated at a price of 34 cents. Do you have a recollection of having paid the invoice price on that merchandise? A. Yes, sir.

Q. To whom did you pay that?

A. To the girl as a rule.

Q. What is your best recollection?

A. To the girl.

Q. You mean one of the employees at the plant?

A. Yes, sir.

Q. The defendants' plant? A. Yes, sir.

(Testimony of George F. Veuhoff)

Q. Now, did you pay any moneys in excess of that amount of the invoice price? A. Yes, sir.

Q. And to whom is it your best recollection that you paid such additional moneys? A. To Jack or Bill.

Q. How much per pound, if you have any recollection, at that date did you pay over and above the 34 cents per pound for the hams?

A. Approximately 10 cents. [149]

Q. A pound? A. Yes, sir.

Q. And how much for the bacon? A. 10 cents.

Q. That is your best recollection? A. Yes, sir.

Q. Have you any figures on that particular invoice that you placed on there in pencil, other than carbon reflections, that help you in arriving at how much you paid as the total? A. Yes, sir.

Q. How much did you pay on that particular invoice?

Mr. McLaughlin: Just a minute. I submit the question should be asked when he made the figures.

Mr. Neukom: Very well.

Q. When did you make the figures?

A. Well, it could be just after I left or when I got home.

Q. Was it while the incident was fresh in your mind? A. Yes, sir.

Q. And was that your general practice?

A. As a rule; sometimes it would not be.

(Testimony of George F. Veuhoff)

Q. And is it your recollection here that you made it shortly after? A. Yes. [150]

Q. How much is the figure, from refreshing your memory from the invoice and your pencilled notations, that you paid monies over and above the amount indicated on the invoice? A. It says \$77.96.

Q. Is that your best recollection? A. Yes, sir.

Q. And to whom did you pay that money?

A. Jack or Bill.

Q. You paid \$77.96 on an invoice that had a total of \$177.64, is that correct? A. Yes, sir.

Q. Or making a total for the entire purchase?

A. Of \$255.60.

Q. And did you pay this extra money in cash?

A. Yes, sir.

Mr. Neukom: I would like to offer Government's Exhibit No. 28 into evidence.

Mr. McLaughlin: Immaterial.

The Clerk: Exhibit 28 in evidence.

The Court: What count does that refer to?

Mr. Neukom: 32, your Honor.

(The document referred to and heretofore marked as Government's Exhibit No. 28, was received into evidence.)

(Testimony of George F. Veuhoff)

[GOVERNMENT'S EXHIBIT NO. 28]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 1-26 1945

Sold to Georges Mkt

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
2544	6.0	Hams R/E S'd	424	.34	144 16
459	3.7	Bacon (F)	134	.27	33 48
<hr/>					
3003					177 64
			[Written]:		77 96
<hr/>					
					255 60

[Stamped]: Paid A

46740

Received By.....

Case No. 18367 Cr. vs. Shubin. Exhibit. Date No. 28 Identification. Date 6/19/46. No. 28 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. Will you please look at this last invoice, Government's Exhibit 29? Look at the back of it or any figuring on it. Do you recall having purchased from the defendants the merchandise that is indicated on that invoice? A. Yes, sir.

(Testimony of George F. Veuhoft)

Q. And what was that merchandise?

A. Hams, skinned hams, 365 pounds.

Q. How much was the invoice price as indicated there? A. 34 cents a pound, \$124.10.

Q. Speak up, please, so everyone here may hear you. And did you pay the invoice price to anyone at the plant? A. Yes, sir.

Q. Did you pay any monies in addition to the invoice to any of the defendants? A. Yes, sir.

Q. To whom?

A. It would have been Bill or Jack.

Q. Referring to the defendants here?

A. Yes, sir.

Q. There is a lot of figuring on the back of this. Does that all pertain to your notations that were made at the time, or are you able to say?

A. I couldn't say for this one.

Q. You couldn't say. Have you any figures on that that you made shortly after the incident that help to refresh [152] your memory?

A. The one on the front here, \$40.15.

Q. Did you make that shortly after the transaction and while the matter was fresh in your mind?

A. Yes, sir.

Q. What does that pencilled notation of \$40.15 that you have made—what does that signify?

A. Cash overcharge.

Q. Is that the cash that you paid to either of the defendants here? A. Yes, sir.

Mr. Neukom: I offer into evidence Government's Exhibit 29, offered in support of Count 33.

Mr. McLaughlin: Immaterial.

(Testimony of George F. Veuhoff)

The Court: In evidence.

The Clerk: Government's Exhibit 29.

(The document heretofore marked as Government's Exhibit No. 29, was received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 29]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 2-5 1945

Sold to Geo's Mkt

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
2190	6.0	Hams R & E Skd	365	34	124 10
			[Written]:		40.15

[Stamped]: Paid B

47034

Received By.....

[Written on Reverse Side]:

369

22

738

738

8118

42.30

365

271

94

45

470

(Testimony of George F. Veuhoff)

376	365
—	11
42.30	—
82.18	365
—	365
124 48	—
	4015

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date No. 29 Identification. Date 6/19/46. No. 29 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Mr. Neukom: Will it be stipulated, counsel, that the last five mentioned documents are carbon copies of originals that are contained in the group of original invoices now in the possession of the Government as an illustration of two groups that I have here, although these particular ones may not be in this stack that I have before me?

Mr. McLaughlin: Yes; the same stipulation I made on [153] the others.

Mr. Neukom: In other words, we are using carbons and there are available originals here in the Government's possession.

Mr. McLaughlin: You are using the carbon copy which the customer got?

Mr. Neukom: That is right.

(Testimony of George F. Veuhoff)

Q. While these transactions in question were going on you were in the retail butcher business?

A. Yes, sir.

Q. I have shown you five invoices. Did you buy more meat than is indicated on these five invoices from the defendants?

A. Yes, sir.

Q. Approximately how often a week did you buy from them?

A. Oh, it averaged three times a week, probably.

Q. Was the procedure that they delivered to you, or you went to the plant and secured it?

A. I picked it up.

Q. At the plant? A. Yes, sir.

Q. Do you ever recall having a specific conversation with any of these defendants with regard to paying above the ceiling price? [154]

A. Yes, sir.

Q. And with whom did you have that conversation?

A. Jack.

Q. Jack Kissel? A. Yes, sir.

Q. And do you recall where that took place?

A. On the dock.

Q. The dock. Let us talk so we all know what you mean. By the "dock", what do you mean?

A. Well, that is the place where they unload the beef.

Q. At their plant? A. Yes, sir.

Q. And about when did that take place?

A. Approximately the first of the year in '45.

Q. And who else was present within the immediate vicinity while you were talking with Mr. Jack Kissel?

A. Nobody.

Q. What is your answer? A. Nobody.

(Testimony of George F. Veuhoff)

Q. Will you relate what was said as nearly as you can recall? And speak up. We can't hear you very well. You are a big man. You ought to be able to talk.

A. I just asked him if I could get some meat there and he said, "Yes." And I asked him what the charges would be and he told me. [155]

Q. What did he say?

The Court: Who?

The Witness: Jack Kissel.

Q. By Mr. Neukom: What did he say, as nearly as you recall? A. About what?

Q. About what the charges would be.

A. Oh, bacon, probably a dime, and hams, a dime, and beef three or four cents, pork loins, eight cents. That is about all I ever used.

Q. Was that the total price on that, a dime a pound?

A. A pound.

Mr. McLaughlin: Just a minute. I object to that on the ground it is leading and suggestive. I submit that the witness can be asked what all was said. Nobody is stopping him from testifying.

Mr. Neukom: Very well.

Mr. McLaughlin: He knows what was said.

Mr. Neukom: May I just go into one point?

Q. Did you ever get any hams or bacon for a dime a pound?

Mr. McLaughlin: Just a minute. I object to that on the ground that that is leading and suggestive and immaterial.

Mr. Neukom: I think that is proper, your Honor, in clarification. [156]

(Testimony of George F. Veuhoff)

The Court: Yes. I do not see how else it can be reached. You may answer the question.

A. Yes, sir.

Q. By Mr. Neukom: Did you ever get a ham for ten cents a pound?

A. Yes, sir. Ten cents a pound; yes, sir.

Q. Total purchase price? A. No.

Q. Now, my question is: Did you ever get a ham for ten cents a pound? A. Over ceiling price; yes.

Q. Now to go back to this conversation, just tell us what was said.

A. I asked him if I could have some meat, I needed meat. I didn't have any. And he said, "Yes." And I asked him how much would it cost me, and he told me the price of each item that I wanted. Do you want the price?

Q. I want to know did he discuss ceiling price, overcharge, or what did he say? Just tell us what was said.

A. Well, the beef would cost three cents a pound over, approximately—I can't remember—and the pork loins, ten cents, and the hams, ten cents, bacon, ten cents.

Q. What was that to be, the total price or what?

A. Overcharge.

Q. After that, then, did you buy merchandise from [157] them? A. Yes, sir.

Q. And did you keep track of what the overcharge was, if any, that you paid?

A. Some way or another in some of the bills I kept track, and in other ways. I don't remember now, but I always had it right handy so I could figure my book.

(Testimony of George F. Veuhoff)

Q. Did you ever get any hams in the three months that you traded with them for a price of 34 cents a pound, without paying any additional sum?

Mr. McLaughlin: That is objected to as immaterial and too broad and indefinite.

The Court: Yes. He may answer yes or no, and let us fix the date.

Q. By Mr. Neukom: I am showing you February the 5th, 1945. Now, during that period or within a period of a few weeks of that date, did you ever get any hams from the defendants in their partnership business at a price of 34 cents a pound and no more?

A. No, sir.

Q. What is your answer? Speak up.

A. No, sir.

Q. What is your best recollection as to what you paid, if anything, over 34 cents a pound during that period?

Mr. McLaughlin: Objected to as too vague and indefinite [158] and general. The questions have been tied down to the invoices involved.

The Court: Yes. I think we can adhere to the invoices.

Mr. Neukom: Very well. That is all. You may take the witness.

Mr. McLaughlin: Will you excuse me for just a moment, your Honor?

The Court: Yes, sir.

(Testimony of George F. Veuhoff)

Cross-Examination

By Mr. McLaughlin:

Q. Do you pronounce your name Veuhoff or Veuhoff?

A. Veuhoff.

Q. Veuhoff. Are you still operating a retail meat market, Mr. Veuhoff? A. No, sir.

Q. How long has it been since you have operated such market?

A. I just closed one approximately a month ago.

Q. I see. Now, you testified that you started doing business with the Vernon Hotel Supply Company in January of 1945? A. Yes, sir.

Q. You had never done any business with that concern or the members of that concern prior to January of 1945? A. I don't recall. [159]

Q. Well, do you know a Mr. Snider?

A. Yes, sir.

Q. What is his full name?

A. Which one? There is three of them.

Q. Well, I will tie it down. When you came to the plant of the Vernon Hotel & Supply Company, you came with a man by the name of Snider, didn't you?

A. No, sir.

Q. You never came with a man by the name of Snider? A. No, sir.

Q. Do you know a Snider that is engaged in the meat business? A. I know two of them.

Q. Two of them. Are they engaged at the same market or do they have separate markets?

A. One is not in it now and one is.

(Testimony of George F. Veuhoff)

Q. You never came to the plant of the Vernon Hotel & Supply Company with either of those two gentlemen? A. Not that I recall.

Q. Did you ever come there with anybody else and buy meat jointly with them and load it into the same truck with this other person who was buying meat?

A. I think so.

Q. Who was that man? A. Glenn Hick. [160]

Q. Glenn Hick? A. Yes, sir.

Q. Did you do that more than once?

A. I might have. He usually went there and brought it to me at my store.

Q. Well, you say you did not do it with Mr. Snider, though? A. No, sir.

Q. Do you remember another man by the name of Shubin, besides William or Frederick Shubin? A man that worked in the refrigerator or the back of the plant?

A. No one there. I didn't know any of them hardly by their names, but I knew one that might have went to school with my brother and talked to him.

Q. With your brother? A. Yes, sir.

Q. Was your brother engaged in this meat business with you? A. No, sir.

Q. Well, do you recall an incident when you were in the back of the plant and either you or a gentleman that was with you gave this man a \$10.00 bill?

A. Bill Shubin?

Q. No, no. A man in the back of the plant of the Vernon Hotel Supply Company a \$10.00 bill? [161]

A. I might have.

Q. You might have? A. Yes, sir.

(Testimony of George F. Veuhoff)

Q. What was said when the \$10.00 bill was passed?

A. Nothing said; just gave it to him.

The Court: Does that connect up in any way with the case? Here is a party who is not in the proceedings at all, a transaction with him, counsel. In other words, I do not want to get too far afield beyond the issues.

Mr. McLaughlin: I will accept your Honor's suggestions.

The Court: All right.

Q. By Mr. McLaughlin: Did you keep your red points that you used in connection with the meat business in a safe jointly with someone else? A. No, sir.

Q. You did not? A. No, sir.

Q. Never did? A. No, sir.

Q. Prior to the time that you came to court to testify in this case, you had talked to representatives of the Office of Price Administration, had you not?

A. Yes, sir; in El Monte High School.

Q. And they had been making claims against you for misuse of red points? [162] A. No, sir.

Q. Had they made claims against you for anything in connection with dealing in the meat business?

A. How do you mean?

Q. Well, anything that they said was unlawful?

A. No, sir.

Q. They had not? A. No, sir.

Q. Did you ever give them any written statement?

A. Yes, sir.

Q. And when did you give such a statement, Mr. Veuhoff?

A. I don't know the exact date but it was in that meeting with all the butchers in El Monte High School.

(Testimony of George F. Veuhoff)

Q. All of the butchers in El Monte High School were there? A. Approximately; quite a few.

Q. And was that a meeting that was called by the representatives of the Office of Price Administration?

A. Yes, sir.

Q. And at that time you gave a written statement?

A. Yes, sir; I think it was.

Q. Did you ever give any other written statement?

A. Two of them, up to my house.

Q. Was that after that meeting?

A. Yes, sir; after I quit the butcher business the [163] first time.

Q. Who were those two men that came up to your house? A. I don't know their names.

Q. Was one of them named Mr. Gorman?

A. I don't recall the name.

Q. You don't recall the name?

A. Just a short, fat one.

Q. Tell us what he said.

A. He just come up there and started talking and wanted to see some bills, and I just took all my bills out and showed them to him.

Q. Bills that you had given to customers of yours?

A. No, sir; bills that I got from various packing houses and meat jobbers.

Q. What did he say? Did he ask you for the bills? You just said he started talking. Can you remember any of that conversation? A. No; I can't.

Q. None of it? A. No, sir.

Q. Mr. Veuhoff, would you give us the first names of the two Sniders that you said you knew? I don't believe you did that. A. Austin and Charlie.

(Testimony of George F. Veuhoff)

Q. Austin and Charlie. [164]

A. I never done business with either one, as far as I can recall. I just know them.

Q. This statement that you signed at the request of this gentleman from the Office of Price Administration, was that written up in your handwriting or did they bring it out, typewritten, and ask you to sign it?

A. He didn't do it exactly that way. He just asked me how much for each item I paid over and I dictated it to him.

Q. And did he write it down on the typewriter at that time?

A. No; I don't think so. I think it was in handwriting, some of it.

Q. And then you signed it there in his handwriting?

A. Yes, sir.

Mr. McLaughlin: That is all.

The Court: That is all.

Mr. Neukom: Just one moment.

Redirect Examination

By Mr. Neukom:

Q. Mr. Veuhoff, this meeting of the butchers that was held at the El Monte High School, did you go there of your own free will? A. Yes, sir.

Q. And when the agents of the OPA came, where did they come, to your house? [165]

A. No, sir. As a matter of fact, I went looking for them.

Q. You went looking for them? A. Yes, sir.

(Testimony of George E. Veuhoff.)

Q. And where did you find them?

A. I found them down there by my butcher shop.

Q. Now, at the meeting how many people were there of the butchers?

A. Oh, I don't know. It was pretty full; one of the schoolrooms.

Q. Have you at any time been threatened by any prosecution by the OPA?

A. If I was, I wouldn't have been looking for them.

Q. My question is: Have you been?

A. No, sir.

Q. Have you had any difficulty with them, any irregularities on red points? A. No, sir.

Q. Have you had any trouble with the defendants here? A. No, sir.

Q. And if I were to show you the statement, without offering it, that you gave, do you believe you would recognize the statement that you gave?

The Court: Oh, I do not believe that is material Counsel just asked him, and he did not go into it. [166]

Mr. Neukom: I merely want to identify it, if I excuse this witness, your Honor, and if there should be any reflection on the proposition. I am not going to offer it. But if I excuse this man to go back to Riverside—

The Court: Identify it. Identify that that is his statement and mark it for identification.

Mr. Neukom: That is all.

Q. I show you an instrument here that seems to be in pencil, from the Office of Price Administration, and do you recall signing that instrument? A. Yes, sir.

(Testimony of George E. Veuhoff.)

Q. About the date it bears? A. Yes, sir.

Q. May the 23rd, 1945? A. Yes, sir.

Q. And there is a second one here, May the 23rd, 1945. Is that an additional statement?

A. It could be.

Q. Well, does it also bear your signature?

A. Yes, sir.

Q. And you signed it? A. Yes, sir.

Q. In front of those gentlemen whose names appear there? A. Yes, sir. [167]

Q. One is Aldridge and one is Richard Cavanaugh, is that correct? Those are the names that appear there?

A. Yes, sir.

Mr. Neukom: For the purpose only of identification can I have this marked?

The Court: Mark it for identification as one exhibit.

The Clerk: Government's Exhibit 30 for identification.

(The document referred to was marked as Government's Exhibit No. 30 for identification.)

Mr. Neukom: That is all.

The Court: That is all. Call your next witness.

Mr. Neukom: May this gentleman be excused, too?

The Court: Mr. McLaughlin?

Mr. McLaughlin: Yes.

The Court: You may be excused.

Mr. Neukom: Mr. Snider.

AUSTIN T. SNIDER,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Austin T. Snider.

The Clerk: S-n-y-d-e-r?

The Witness: S-n-i-d-e-r.

Mr. Neukom: May I have four invoices marked? [168]

Direct Examination

By Mr. Neukom:

Q. Mr. Snider, while we are having these marked, where do you live?

A. 637 West Mildred, El Monte.

Q. Are you in the meat business now?

A. I am not.

Q. Were you formerly in the retail meat business?

A. I was.

Q. And during what periods as nearly as you can recall?

A. From 1937 until the time I was drafted in the Army, April, 1945. [169]

Q. And did you go back? A. No.

Q. And did you maintain a market, let us say since the war now, since the latter part of 1942? Let us forget back in 1937. Since the latter part of 1942 until you went in the Army in April of 1945, where did you maintain your butcher shop?

A. At El Monte, California.

Q. Under any particular name?

A. P & S Market.

(Testimony of Austin T. Snider)

Q. And during any of the period that you have mentioned, that is to say in 1944 or 1945, did you purchase any meats or supplies from the Vernon Hotel and Restaurant Supply Company? A. I did.

Q. That is these defendants here? A. Yes.

Q. And are you acquainted with William Shubin?

A. I am.

Q. And have you had business relations with him?

A. I have.

Q. Are you acquainted with Frederick Shubin?

A. I am.

Q. Are you acquainted with Jack Kissel?

A. I am.

Q. Have you had business relations with both of the [170] last-mentioned defendants?

A. Yes, I have.

Q. I show you Government's Exhibit 31 for identification, dated December 7, 1944, invoice No. 45217, which indicates a merchandise purchase of what?

A. Packer hogs, 256 pounds at 21-1/2 cents a pound.

Q. Did you buy that merchandise from the defendants' partnership? A. Yes.

Q. And at the time in question did you pay for the invoice, the invoice price? A. Cash on delivery.

Q. Was that brought to you or did you go and get it?

A. I went there and got it.

Q. And did you pay any moneys in addition to the invoice total there to any of the defendants here?

McLaughlin: May the record show that the witness is looking at the back of the invoice and I think when they testify to matters. if they don't recall without looking at the invoice, I think we should have a foundation.

(Testimony of Austin T. Snider)

Mr. Neukom: Very well.

Q. Will you please look at the invoice on the back of it and see if there is any writing there that refreshes your recollection?

Mr. McLaughlin: In the first place he should testify [172] that he has no personal recollection.

The Court: Yes. First ask him if he has any personal recollection entirely aside from any memorandum.

The Witness: At times I paid over.

The Court: No. Listen to the question.

Q. By Mr. Neukom: Do you have a definite personal recollection of how much you paid over the invoice price per pound without looking at some writing on the invoice? A. Of this particular bill?

Q. Yes. A. I cannot say truthfully I recall.

Q. Did you make any writing upon the bill after the transaction in question that assists you in your recollection?

A. This writing is writing that was placed there—

The Court: No. Listen to the question. Repeat the question, Miss Bennallack.

(Question read.)

The Court: Yes or no.

The Witness: No.

Q. By Mr. Neukom: Did you have the bill before you at the time when you were consulting this incident with another whereby you had a more vivid recollection of what if any moneys you paid per pound over the indicated price per pound? [172] A. Yes.

Q. And at that time were writings placed upon the back of the amount per pound? A. They were.

(Testimony of Austin T. Snider)

Q. And are those figures that are on the back, was that your present recollection of what you did pay per pound at the time in question?

Mr. McLaughlin: Your Honor, he has already said he did not have any present recollection so it would have to go back to the recollection at the time he wrote them, and I submit he should testify as to the times, places and parties present.

The Court: Lay a further foundation.

Mr. Neukom: Very well.

Q. When did this incident occur that these writings were placed on there as near as you can recall?

A. When the OPA men contacted me, some of them.

Q. That is about how long ago?

A. Well, they contacted me twice, the first time when I was still in the meat business before I went in the Army.

Q. And that is about when?

A. That was during the late summer of 1944.

The Court: It is now 12:00 o'clock. Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss the matter among [173] yourself or permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court. We will now take a recess until 2:00 o'clock.

(Thereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p. m.) [174]

(Testimony of Austin T. Snider)

Los Angeles, California, Wednesday, June 19, 1946.
2:00 P. M.

The Court: Mr. Cross, call the calendar.

(Case called by the clerk.)

The Court: Stipulate the jury are present, gentlemen?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: Stipulate the defendants are in court?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Proceed.

AUSTIN T. SNIDER,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (resumed)

By Mr. Neukom:

Q. Mr. Snider, I show you Government's Exhibit 31 for identification and ask you to examine this invoice, dated December 7, 1944. Do you have a present recollection, by refreshing your memory from looking at that invoice, of having purchased the pork hogs, 256 pounds, that are indicated there on December 7, 1944?

A. Yes.

The Court: What is the answer? [175]

A. Yes.

(Testimony of Austin T. Snider)

Q. By Mr. Neukom: And at that time did you pay the invoice price of \$55.04? A. I did.

Q. And did you pay to any of the defendants any monies in addition to the invoice price of \$55.04?

A. Yes.

Q. What is it your best recollection of how much per pound, if any, you paid? A. Eight cents.

Q. And to whom is it your best recollection that you paid such sum? A. Mr. Kissel.

Mr. Neukom: Jack Kissel. I would like to offer into evidence—

Q. I note that this bill has “Jack”, or is that “Jack” there over the paid stamp?

A. That is his signature that it is paid.

Mr. McLaughlin: Before it is received, I think the record should show—I want to make an objection that it is immaterial; and further, that that is the transaction which the witness this morning said that he did not remember, and then he was asked about notations on the back of the invoice, and apparently counsel for the Government have not seen fit to ask him anything further about it at all, but his mind has [176] been refreshed.

The Court: In evidence.

The Clerk: Government's Exhibit No. 31 in evidence.

(The document referred to was marked as Government's Exhibit No. 31, and was received into evidence.)

(Testimony of Austin T. Snider)

[GOVERNMENT'S EXHIBIT NO. 31]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 12-7 1944

Sold to A. T. Snyder

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
cts.					
410	1.6	Pkr. Hogs	256	21½	55 04

[Stamped]: Paid Jack

45217 Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 31 Identification. Date 6/19/46. No. 31 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

The Court: Count what is that?

The Clerk: Count 24, your Honor.

Mr. Strong: Count 24. [177]

The Court: Exhibit what, Mr. Cross?

The Clerk: Exhibit 31, your Honor.

Q. By Mr. Neukom: I now show you Government's Exhibit 32 which is offered in support of count 23 and ask you to look at the invoice dated November 29, 1944. From refreshing your memory and looking at this invoice, the carbon copy of the invoice, is that the one you received when you purchased the merchandise?

A. Yes.

(Testimony of Austin T. Snider)

Q. You will note that it gives a total of \$121.80 for the three items that are mentioned there. Is that correct?

A. That is right.

Q. And did you pay that amount of money, the amount of the invoice, to the establishment owned by the defendants? A. I did.

Q. Did you in addition to that pay any moneys to one or either of the defendants for the merchandise over and above the price per pound as is indicated?

A. I did pay over.

Q. Now as to the bellies. Do you have a recollection of approximately how much you paid over?

A. Five cents per pound.

Q. And what is the second item?

A. Two hogs. [178]

Q. And how much a pound did you pay over on that, to your best recollection? A. Eight cents.

Q. What is the next item?

A. Back fat. Nothing over on that.

Q. Do you recall to whom, if anyone, that you paid that extra money?

A. It was one of the two, Jack or Bill.

Mr. McLaughlin: Mr. Neukom. I don't think you asked the witness to whom he paid the money in connection with the previous invoice. You may have, but I don't think you did.

Mr. Neukom: I thought he testified he paid it to Jack Kissel.

The Court: That is the testimony.

Mr. McLaughlin: Oh, I see.

Q. By Mr. Neukom: Is it your testimony here that you paid it to Jack or Bill? A. Jack or Bill, yes.

(Testimony of Austin T. Snider)

Q. You knew both of them at the time?

A. Yes.

Mr. Neukom: I offer it in evidence in support of count 23. This is Exhibit 32.

Mr. McLaughlin: Objected to as immaterial.

The Court: In evidence.

The Clerk: Government's Exhibit 32 received in evidence. [179]

(The document referred to was received in evidence and marked as Government's Exhibit No. 32.)

[GOVERNMENT'S EXHIBIT NO. 32]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., Nov. 29, 1944

Sold to A. T. Snyder

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
	—	Bellies	239	21¾	51-98
494	1.6	F Hogs	309	21½	66 44
	—	Back Fat	26	13	3 38
Pd					<hr/>
					121 80

[Stamped]: Paid A

44976

Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 32 Identification. Date 6/19/46. No. 32 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Austin T. Snider)

Q. By Mr. Neukom: I now show you Exhibit 33 for identification and you will note that it bears serial No. 47882, dated 2/26/45, and ask you to look at that and see if you purchased from the defendants' partnership the hogs, the meat, that is indicated there.

A. That is correct.

Q. How many pounds?

A. 588 pounds at 21-1/2 cents a pound.

Q. Did you pay for that item?

A. I paid that, \$126.42.

Q. Did you pay an additional sum per pound to one or either of the defendants?

A. Eight cents per pound.

Q. To whom is it your best recollection that you paid that?
A. Jack or Bill.

Q. Jack Kissel or Bill Shubin, is that correct?

A. One of the two, yes.

Mr. Neukom: I will ask to have received in evidence Exhibit 33, offered in support of count 25.

Mr. McLaughlin: The same objection, immaterial.

The Court: Overruled. In evidence.

The Clerk: Government's Exhibit 33 received in [180] evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 33.)

(Testimony of Austin T. Snider)

[GOVERNMENT'S EXHIBIT NO. 33]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 2-26 1945

Sold to Snider

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
2058	35	Pkr. Hogs	588	21½	126 42
Pd					

[Stamped]: Paid A

47682 Received by.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 33 Identification. Date 6/19/46. No. 33 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Neukom: Now, I show you Government's Exhibit 34, invoice serial No. 47443, indicating a purchase on February 16, 1945, of "C" beef in the amount of 836 pounds, total purchase price \$152.57. Does the invoice serve to refresh your recollection of the incident of this purchase?

A. That is correct, the merchandise represented.

Q. And did you pay for the invoice price?

A. I did.

Q. And did you pay any sum in addition per pound as indicated here to one or either of the defendants?

A. Yes.

(Testimony of Austin T. Snider)

Q. How much a pound did you so pay?

A. Three cents.

Q. Do you recall to whom it was paid?

A. Jack or Bill.

Q. Was that paid in cash or how?

A. Cash over the counter.

Mr. Neukom: I will offer in evidence in support of count 10 Government's Exhibit 34.

Mr. McLaughlin: Immaterial.

The Court In evidence.

The Clerk: Government's Exhibit 34 received in evidence. [181]

(The document referred to was received in evidence and marked as Government's Exhibit No. 34.)

[GOVERNMENT'S EXHIBIT NO. 34]

[Invoice of Vernon Hotel & Restaurant Supply Co.]

Vernon, Calif., 2-16 1945

Sold to Snider

Address.....

Pcs.	Lbs.	Item	Wght.	Price	Amount
4096	4.9	C Beef	836	18¼	152.57

[Stamped]: Paid A

47443 Received By.....

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 34 Identification. Date 6/19/46. No. 34 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

(Testimony of Austin T. Snider)

Mr. Neukom: You may take the witness.

Cross-Examination

Mr. McLaughlin: May I have the invoices that have been received this afternoon?

Q. Mr. Snider, are you operating a retail meat market at the present time?

A. No, I haven't had one since I went in the Army.

Q. Now, before the lunch hour you were shown one of these invoices which has been received in evidence and then you were questioned as to whether you paid over or not. Do you recall that question? A. I do.

Q. And is it true that you said you couldn't recall any incidents? A. Yes, that is right.

Q. And then you were questioned regarding some pencil notations on the back of that invoice and you stated that it had been written down but it was some time after the invoice had been issued. Is that right?

A. Yes.

Q. Now, will you tell the jury and the court approximately how long it was after you wrote those figures on the back of that invoice? [182]

A. It was at the time that the OPA gentlemen came to my house and secured the bills and secured a statement from me.

Q. And that was approximately in the fall of 1945, around October or November?

A. No. That time was when we went to school and had that meeting. At the time they came to my house, it was some time after the first of this year. The bills had been laying in the garage quite a while.

(Testimony of Austin T. Snider)

Q. And at the time they came to your house there were no pencil notations on the back of these bills, were there? A. Yes, there was on some of them.

Q. Well, do you recall whether there was on any of the ones which you were shown—any of the ones which were shown you by Mr. Neukom?

A. You mean which ones did have any?

Q. Yes, which ones did have pencil notations and which ones did not? A. These bills did.

Mr. Neukom: Indicating?

Mr. McLaughlin: Indicating Exhibits 34 and 33.

The Witness: And I don't believe that either of these did.

Q. By Mr. McLaughlin: Now you are referring to Nos. 31 and 32? A. That is correct. [183]

Q. At the time they came to your house did you put the figures on the two, No. 31 and No. 32, at that time?

A. That is the time I wrote on them.

Q. And from what did you get the information that you wrote those figures on at that time?

A. I can explain that.

Q. Go ahead. A. These bills show hogs.

Q. You are referring now again to Exhibits 33 and 34? A. The same as these.

Q. Yes.

A. And I happened to know that after thinking that during this period the hogs were scarce, and I secured no pork without paying over for it, that is how come that I know I did pay over on these even though it was a later time. I had to recall that I did.

(Testimony of Austin T. Snider)

Q. And when you came to court this morning you did not recall how much you paid over until you looked at the back of these slips?

A. The date on the invoice. You see, I have been in the meat business for 10 years and it could have been. I been in business down there before hogs were scarce.

Q. But you had no independent recollection this morning as to what you paid over until you looked, until you refreshed your mind by looking on the backs? [184]

A. Well, I was being nailed down to this one bill and I wasn't very positive.

Q. Yes, and that is the one that you wrote the figure on then at the time the OPA gentlemen called at your house? A. Yes. [185]

Q. And that was in 1945?

A. I wanted to be fair about it and I was not sure at that time.

Q. On these others, now, the ones which are Exhibit No. 33——

The Court: You do not answer counsel's question. Strike out the answer. Read the question, Mr. Reporter. (Question read by the reporter.)

The Court: Now read his answer.

(Answer read by the reporter.)

The Court: It does not answer his question.

A. This morning, when he asked me about this bill——

The Court: No, no. Now, listen. He is asking for a date.

The Witness: Read it again.

(Question again read by the reporter.)

The Court: Now, that is all there is to the question.

(Testimony of Austin T. Snider)

The Witness: I don't get it.

Q. By Mr. McLaughlin: Well, when was it that the OPA gentlemen called at your house? That is what we are after.

A. It seems to me that it was in '46, this year, early.

Q. About January?

A. Yes; and it could have been late '45 Mr. Wells came to me. He was the one that came there. [186]

Q. Mr. Wells was the one that came? Now, during the noon recess you have discussed this testimony with Mr. Wells, haven't you? You saw him and you talked to him about your testimony as to the over-prices?

A. No; I haven't talked to him about it.

Q. You didn't see him at all during the——

A. I seen him just before the court came in session now.

Q. Did you look at these invoices over the lunch hour?

A. Never seen them.

Q. You never saw them? A. No.

Q. And you had no discussion with Mr. Wells regarding your recollection as to your figures that appear on the backs of the invoices? A. No.

Q. None at all?

A. I didn't talk to him at all about that.

Q. You testified that, as to Exhibits 31 and 32, the figures which you wrote on when the OPA representatives called at your house were written because that was the time pork was scarce and that was the reason that you put down the figures you did?

A. According to the date on that bill, yes.

Q. Referring again to 33 and 34, will you state when you wrote the figures on the backs of those two? [187]

(Testimony of Austin T. Snider)

A. That was the same day the merchandise was purchased.

Q. And do you recall to whom you paid this money which you testified you paid over on Exhibits 33 and 34? You testified it was to one or the other of two parties; do you recall which party?

A. Just which one exactly?

Q. Yes.

A. I can't, but I know it would be one of the two because no other person ever received it from me.

Q. Did you have a discussion with any of the defendants regarding their not selling you any meat unless you paid in excess of ceiling?

The Witness: Repeat that, please.

The Court: Mr. Reporter?

(Question read by the reporter.)

A. No; I didn't.

Mr. McLaughlin: That is all.

Mr. Neukom: No further questions.

The Court: That is all.

Mr. Neukom: Can the witness be excused?

The Court: Mr. McLaughlin?

Mr. McLaughlin: Yes; he is excused.

The Court: You are excused.

Mr. Strong: Mr. Romero.

Mr. Neukom: Will it be stipulated that, as to the last [188] four invoices, if we have not heretofore stipulated, the same stipulation prevails as to the ceiling prices?

Mr. McLaughlin: Yes, sir.

Mr. Neukom: And that they are carbon copies of the original invoices, also available?

Mr. McLaughlin: That is right.

Mr. Strong: Your Honor, we subpoenaed this witness some time ago and he has not been here for the last two days.

The Court: We will give him an opportunity to appear and if he does not, we will hold him in contempt.

Mr. Strong: At this time I would like to offer into evidence the following certified copies of income tax returns—these are income tax returns for the defendants Kissel, William Shubin, and Fred Shubin for the years 1942, 1943, and 1944, and for the partnership under its partnership name of Vernon Hotel & Restaurant Supply Company for the years 1942, 1943, and 1944.

There are various copies here which are simply the single returns for the year, and there is either an original return and an amended return for the same year. And I would like to offer these into evidence.

Mr. McLaughlin: Now, your Honor, before your Honor rules on that I want to be heard. I think we are entering into a new phase of this case and I think it is one that there should be some legal argument on; and I believe, also, that [189] Mr. Strong, following the offer of the documents he has offered, is going to offer some others, a little different type of documents, and I am reasonably satisfied that in order for him to make an appropriate offer, the offer should be made in the absence of the jury; and I believe that this argument should be made in the absence of the jury because it is very hard to argue these things without discussing the contents, and if we have to discuss all the contents of these documents, to a

certain extent the effect of a ruling is negated. I think you will agree.

The Court: I do not see that it follows. I can understand what the argument is and what the legal argument is in the matter. I have had it presented before. I do not believe that it is necessary to go into the details of the figures or the amounts in order to press the objection counsel has in mind. I do not think you have to discuss the contents. An income tax, as everyone knows—and they have all made out income tax returns and they know what they are required to do—the returns are supposed to be made to the Government.

Mr. McLaughlin: I might supplement what I stated by saying that one of the bases of my objection is the materiality and the competency to prove any issue in the case; and in order for it to be pointed out what they prove, the contents have to be discussed.

The Court: Well, if counsel desires it that way. [190]

(The court admonished the jury and the jury retired from the court, whereupon the following proceedings were had in their absence.)

The Court: Proceed.

Mr. Strong: These returns are offered, your Honor, as the returns of the individual defendants in this case.

The Court: Let the record show the jury has withdrawn.

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

And they are for the years which are alleged in the indictment, that is, which the indictment covers.

One of the issues in this case, and the basic issue, of course, is the collection of over ceiling amounts by the

defendants in their sale of meats to retailers. And this evidence tends to disclose that such collections were made during the periods of this case.

There are filed here original returns for the years 1942, 1943, and 1944. On those returns the defendants reported the income which they had had entered on their books. That was not the full income which they received during those years. The amounts named on the books of the defendants were the sums which they had collected as the ceiling prices on the goods sold; and those sums shown on the books were simply the record entries of the invoiced merchandise such as we have been discussing here, which, in every instance, I think, were [191] at ceiling price.

The total amount of income shown on the books was the maximum legal price income. The amounts which the defendants received in addition, as has been already testified to by three witnesses here, were not entered on their books and were not, as a matter of fact, included as part of their income. I might qualify that and say that there were some entries on the books which we will later show to your Honor were false entries of various types, intending to conceal the true source of the money as black market collections.

But these income tax returns on their face disclose this: That the defendants report on their original income tax return a certain income for the partnership for the year 1942, for example; then each of the defendants reports his own proportionate share of the income as his income. The same thing is done for 1943 and 1944.

Sometime subsequently, the defendants filed amended income tax returns and the amended income tax returns disclose incomes which are way in excess of those which they had originally reported, and these differences between

the original return and the amended return, the difference in sums of income reported, are the black market profits which the defendants collected during those years.

The fact that there is this divergence, this difference, rather, in the income reported on the original and the amended [192] returns for each year, I think has considerable probative value before a jury or before a court trying the facts themselves, since it tends to disclose that the books which purport to show the entire income received from the sales of meat at ceiling prices do not report the entire income; that there is more income coming in from elsewhere which is reported in the amended return, and that is income which we will subsequently show to your Honor with other witnesses in more detail—that income will be disclosed as black market profits.

The returns, of course, themselves are admissible in evidence, as they are certified copies, and I need not go into that with your Honor.

Mr. McLaughlin: No. We make no issue, your Honor about the power of the attorney for the Government to get these returns and to use certified copies.

The basis on which we object to the introduction of each of these returns is that they are not material and that they are not probative of any issue in the case and, to the extent that they can possibly be said to be probative, they are too remote, speculative and confusing. In other words, Mr. Strong has stated that he expects to show that the returns conflict with the ledgers, the general ledgers of the defendants.

Mr. Strong: I have not said that, your Honor. [193]

Mr. McLaughlin: All right.

The Court: Let counsel finish.

Mr. McLaughlin: In other words, that the returns show sales in excess of the sales which the books of the defendants show. I used the words "general ledger" because I thought that is where it was. But, in any event, it is in excess of what the books show.

I submit, in the first place, that that is a reverse method of attempting to prove something and that if you can draw an inference in that direction, it is far too remote and too speculative; and if your Honor will look at these returns, it will be borne out. I mean I can say in advance there is a statement in these returns that says "gross revenue for the year". I think the words used are "gross revenue". I copied it down but I lost that quotation. But anyway, it is "gross receipts" or "gross revenue." Then it gives a certain figure. On the books of the company it says "gross sales".

There could be a lot of inferences that can arise as to whether the difference is brought about by other income or how the difference is arrived at. But, let us assume that the difference can be arrived at only by reason of the fact that gross sales mean the same thing as gross revenue. Let us just assume that, without conceding it. And therefore they put in a Government return which says: "Our gross [194] returns are blank dollars," and the Government says, therefore, "You sold in the black market because your books only show that you sold X dollars worth of goods, and the difference must mean therefore that you were in the black market and did not want to disclose it."

I think there are presumptions against crime and there are presumptions that a person has not committed a crime, and there are many—in other words, it may be presumed that their books were erroneous in the first instance, as far as that is concerned. There are just a lot of things

that could happen, but when you come right down to it, it boils down to the fact that they are trying, first, to get in the Government returns, and then the next step they are going to go is to get in the defendants' private books and records. [195]

This is not a corporation and these books and records outside of the invoices which they have received and which they could use—they obtained these invoices from other people and there is no question about the fact that there is no privileges to them, but these other books and records are private books and records and they have no right to these books and records. If they are incriminating, they have no right to use them against these defendants unless these defendants have waived the privilege. Now, we are going to contend here that we have definitely not waived the privilege with the possible exception of one or two books for the year 1944 which I think were voluntarily given. The others were obtained under subpoena and I don't believe they can be used.

As a matter of fact there are two recent Supreme Court decisions. While those cases held that the parties had waived the privilege—I am sure that your Honor is familiar with them—one of them is *Davis v. United States* which just came down. That was decided on June 10, 1946; and the other one is *Zapp v. United States*, and while in those cases they recognize that you can waive your privilege, they do adhere to the well established rule that books and records that are personal to the parties cannot be used against them in civil proceedings and that is an additional objection to the objection that I just made because there is no use in letting these returns go in evidence unless they are going to be con- [196] nected up with something that is admissible and I say and repeat to

summarize again that if the returns are admissible at all they are admissible as an admission against interest on the part of these parties and the only admission against interest which they could possibly embody would be an admission that their total sales as shown in their books were erroneous. Now, that is the most.

Now, the government wants the jury and the court to draw from that the inference that because there was a difference the difference must necessarily have been obtained in the black market and I don't think that follows and I think that method of proof is too remote and speculative.

The next objection is that to make the returns effective even through that they have got to put in evidence books and records which are private documents and as no privilege has been waived I submit therefore for the second reason that the offer should be rejected.

The Court: I tried the Zapp case and he was convicted. The attorney strenuously objected on the same grounds that you have urged. The Circuit Court affirmed and the Supreme Court of the United States affirmed the conviction.

Objection overruled and exception allowed the defendants.

Mr. Strong: I might say, your Honor, while the jury is out we might as well take up the second phase of my testimony [197] that I am going to offer.

The Court: Yes.

Mr. Strong: While I don't want to go back over what counsel said, I simply want to point out that I have not as yet offered any books and records and it is not at all certain that I am going to offer any at all in this trial.

The thing, however, which ties up directly with these Internal Revenue reports and concerning which I am sure there will be considerable discussion are certain written admissions of the defendants. They are signed admissions and they are in question and answer form. There are three admissions. One of each is signed by each of the three defendants. They consist of questions and the answers given by the defendants before representatives of the Internal Revenue Bureau and they were taken some time in July of 1945.

At the time that these statements were taken the Internal Revenue representatives who were present were doing the questioning and attending each of the defendants were their attorneys whose names are given here and various agents and stenographers.

These are statements which go into considerable detail as to how each of these defendants collected their black market charges, how much was collected, and the amounts of course conform with the income tax returns, how they covered up these collections, and what they did. In other words, they [198] go into the whole scheme which we have charged here and deal in considerable detail with a lot of admissions of various types.

These statements I might say were given in connection with the amended income tax returns which were filed here and they are apparently as the witnesses will testify supplementary of those returns and made by the defendants in an attempt to justify these various sums and to prevent the Internal Revenue people from assessing any penalties against them or instituting any charges. They were statements in which the defendants tried to convince the Internal Revenue people that everything they did was right and that they wanted to make a return to the In-

ternal Revenue but it was only the OPA regulations keeping them from doing it because if they revealed these facts the OPA would know there were violations and so would others, but these are detailed statements and I propose to offer these by persons and people present if necessary and they will testify to these statements being taken and the stenographers are here with their notes, and the only question so far as I can see is to the admissibility. These statements are admissible under the regulations of the Internal Revenue Department of the Internal Revenue Bureau. There are certain steps necessary to obtain the testimony of the agents present at the taking of these statements and certain steps necessary to obtain the statements themselves and [199] to make them available for use in evidence. Those steps as it will be disclosed later on were fully complied with and the statements are here in full accordance with the law and they are admissible here.

Mr. McLaughlin: Well, let me ask this question of Mr. Strong, your Honor. Mr. Strong, do you state that those documents that you just referred to were obtained from the Treasury Department in the same manner that you obtained the certified copies of the returns?

Mr. Strong: No. These are not certified. Obtained from the people here?

Mr. McLaughlin: Yes.

Mr. Strong: From the agents here.

Mr. McLaughlin: Well, of course this is anticipating the offer, but as long as the jury isn't here I would like to point out that if those documents have any significance at all and if the Treasury Department had any right to take them, they took them in the course of their duty in connection with obtaining information with respect to

income tax and they are a part of the returns which have been filed. They are supplementary to it and under the regulation relating to the production of income tax returns or certified copies of those—I will read that regulation—I submit that the government has not complied with it. It is set forth in Volume 2 of Commercial Clearing House on Taxation. That is where I got [200] this, page 3124, paragraph 517. It says:

“The return of an individual, partnership, corporation or fiduciary or a copy thereof may be furnished to a United States Attorney for official use in proceedings before a United States grand jury or in litigation in any court, if the United States is interested in the result, or for use in preparation for such proceedings or litigation; or to an attorney of the Department of Justice, for like use, upon written request of the Attorney-General, the assistant to the Attorney-General, or an assistant attorney-general.”

Now, this is the condition which I say the government has to comply with. First, upon written request of the Attorney-General, the assistant to the Attorney-General, or an assistant attorney-general.

“If a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished and is under no condition to be made public except to the extent that publicity necessarily results from such use.”

Now, the Code section which provides for the production of such return is referred to the Secretary of the Treasury. He is the one that furnishes it and that is Section 55 of [201] Title 26 of the United States Code Annotated. That says that returns shall constitute public records; but, except as hereinafter provided in this section,

they shall be open to inspection only upon order of the President, and under rules and regulations prescribed the Secretary and approved by the President.

In other words the statute ties over into the Secretary of the Treasury and the President and when they get one of these documents which they can use in a court of law it must come from the Secretary and it must come with his approval upon a written request of the Attorney-General, and I submit that they cannot circumvent the express terms of that statute by going to the Department of the Internal Revenue here and bringing them up.

Mr. Strong: Well, if your Honor please, counsel assumes certain things that just aren't so. We are not coming here and offering in evidence documents clearly as inadmissible as counsel states it.

I might state that these were obtained in accordance with the regulations of the Secretary of the Treasury which were issued in connection with the use and obtaining of these documents.

I might point out that the statute itself as counsel has stated makes these regulations the basis for getting these documents, and Article 80 of these regulations says [202] that all records in the offices or in charge of officers of Internal Revenue, responsible or subordinate, are in their custody and control for governmental purposes only.

It then goes on to say: "Internal Revenue and prohibition enforcement officers are hereby prohibited from giving out any records, or any copies thereof, to private persons or to local officers, or to produce such records or copies thereof in a state court, whether in answer to subpoenas duces tecum or otherwise, or to testify to facts

coming to their knowledge in their official capacities without express authority from the Commissioner."

I might go on further to say that the use of these returns and other information is expressly made available to United States Attorneys, Assistant United States Attorneys and attorneys of the Department of Justice by Treasury decisions which counsel has read and a copy of which I would now like to hand to your Honor.

Now, the method of obtaining authority for the use of these things is to write to the Attorney-General of the United States and to ask him to write to the Secretary of the Treasury or the Commissioner of Internal Revenue and to have the Commissioner of Internal Revenue write to the officers down here and authorize them to make these disclosures.

In this case I state to your Honor that that has been fully complied with and the officers are here and prepared to [203] testify about these statements which they have in their possession, the original signed letters of the Commissioner of Internal Revenue authorizing them to testify and to give all and any information necessary in this case which is specifically named by name and the defendants are specifically named by name. So, I don't think there is anything improper as to the method of the production of these documents or as to how we obtained them. I didn't go to the Internal Revenue people here and simply demand these things from them. The procedure prescribed was fully complied with and the letters are now in the possession of the agents who are in the court room and ready to produce them. I think there is no basis for excluding these documents in that connection.

Also I might call your Honor's attention to *Gibson v. U. S.*, a Ninth Circuit case, 31 Fed (2d) 19, which again

provides that copies of the income tax returns may be furnished by the Commissioner to the United States Attorney or his assistants upon request for use as evidence in any litigation in a court where the United States is interested in the result, and the mere fact that we have these documents here in certified form I think in itself indicates that the proper procedure was followed in asking for them because otherwise we would not have got them and here they are.

Mr. McLaughlin: Mr. Strong, I am not questioning the certified copies of the returns at all as having been law- [204] fully obtained. I stated that to begin with. The things I am questioning are the three confessions that you have in your hand and I am questioning the proof of the procedure that should have been gone through. Now, I don't think it has been gone through.

The Court: But there is no reference in these statutes here or regulations with reference to statements. As I recall the section of the statute, it refers to the return. Now, the statements made are not part of the return.

Mr. Strong: Treasury decision 4929, Section 463-C. 35 which appears in CCH, paragraph 506, deals specifically with information returns, schedules, lists and other statements designed to be supplemental to, or to become a part of, the returns and shall be subject to the same rules and regulations as to inspection as are the returns themselves. In any case where inspection of the return is authorized by these regulations, the Commissioner may, in his discretion, permit inspection of other records and reports which contain information included or required by statute to be included in the return, and these statements were supplemental and incidental to the returns.

May I say just one more word, that the people who are here to testify concerning these have the authority with them which gave them full power to make these disclosures.

The Court: I want the record to be clear and particular- [205] larly the objection of the defense so that if this court makes any error it can be corrected. You had some other comment?

Mr. McLaughlin: I think Mr. Strong stated since he has argued that the three statements have been obtained from the Commissioner in the same manner that the photostat of the returns. Is that what you state?

Mr. Strong: I have already stated that the returns were obtained as shown and that the witnesses who will testify and who gave us these things gave them to us pursuant to authority from the Commissioner which they have in their possession.

In other words, we took all the legal steps necessary. We didn't come here simply with copies of these documents but with copies which are properly introducible in evidence.

Mr. McLaughlin: Well, just to clarify it, your Honor. I am not questioning their authority to produce the certified copies because I am going to assume that they have gone through the necessary procedure to get them. They appear to be from the Commissioner in Washington. I am, until proof is shown that they have gone the appropriate procedure to get these three statements or confessions, questioning the foundation.

The Court: All right.

Mr. McLaughlin: And the other objection I made is that they are not provative of any issues in the case be-

cause these [206] do not bear on the failure to keep proper records. I find nothing in the regulations under the law that makes it an offense to conceal the commission of an offense under the OPA. Of course if he conspired to do it, it might deal with that, but a mere concealing of it is not an offense under the statute, and what they are trying to prove here is that they concealed money that they got and therefore the jury must assume that they must have got the money they concealed in the black market.

Mr. Strong: No, your Honor, what we intend to prove is that they got in the black market rather than that they concealed it, and in that connection possibly your Honor would like to look at one of these letters of authority at this time.

The Court: I will see it when it comes in its regular order. Overruled. Exception allowed. Call the jury.

Mr. McLaughlin: Before the jury comes in, might I just say this. It was my understanding that the Zap case involved a situation where they waived the privilege. I don't want to argue that now. I would like to argue it later at the end of the case.

The Court: Yes. I am very familiar with that opinion and with that case.

Mr. McLaughlin: Yes, I knew your Honor was.

The Court: And there were dissents in the case. [207]

Mr. McLaughlin: Yes.

The Court: Four to three.

Mr. McLaughlin: Yes. It was a close decision.

The Court: Yes, with only seven members of the court. What are the numbers of the income tax exhibits, Mr. Cross?

The Clerk: They will be, your Honor, Exhibits 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49.

(Thereupon the jury returned to the court room and the following proceedings were had:) [208]

Mr. Strong: Mr. Bircher.

DONALD OLIVER BIRCHER,

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Donald Oliver Bircher.

The Court: What is your business or occupation?

The Witness: Special agent of the Bureau of Internal Revenue.

The Court: Proceed.

Direct Examination

By Mr. Strong:

Q. Mr. Bircher, are you here under subpoena?

A. I am.

Q. And are you acquainted with the defendants in this case? A. I am.

Q. And did you during 1945, in July of 1945, have occasion to discuss with these defendants or any one of them their income tax returns for preceding years?

A. Yes.

Q. And did you at that time have before you any income tax returns that had been filed by the defendants?

A. Yes, I had copies that they furnished.

Q. I show you Government's Exhibits 35 to 49 inclusive [209] and ask you whether these are certified copies of the returns which you examined at that time.

A. Yes, they are.

(Testimony of Donald Oliver Bircher)

Q. And did you have any other persons employed by the Bureau of Internal Revenue assisting you in that matter? A. Yes.

Q. Could you tell us who they were?

A. Special agent Phoebus.

The Court: How do you spell that?

The Witness: P-h-o-e-b-u-s.

Special agent Phoebus was with us on July 24, 1945, when William Shubin was in our office, and Frederick Shubin, and they were represented by their attorneys.

Q. By Mr. Strong: I just want the names of the agents who were assisting you in this matter at all times.

A. Mr. Phoebus, Special agent Walter Schlick and Mr. Eustice; Internal Revenue Agent Eustice later joined in the investigation.

Q. And would you state briefly what you were doing officially in connection with those returns?

Mr. McLaughlin: Just a moment. I object to that as a conclusion and immaterial.

Mr. Strong: I am just laying a foundation, your Honor, to get into the main substance of it.

The Court: I don't see how that can be reached. I will [210] permit the question.

The Witness: Would you repeat the question, please? (Question read.)

The Witness: We were attempting to verify the income reported in the amended returns and were reviewing the amended returns or copies thereof with the Shubins and with their attorneys.

Q. By Mr. Strong: Had there been returns, original returns filed by each of the three defendants?

(Testimony of Donald Oliver Bircher)

Mr. McLaughlin: I think the records speak for themselves, Mr. Strong, and there is no doubt but what the originals were filed and the amendments.

The Court: All right. That will shorten the matter. Proceed.

Mr. Strong: All right.

Q. Now, on July 24, 1945, did you have any conversations with any of the defendants concerning these income tax returns? A. Yes.

Q. Where was that?

A. It was in our conference room on the 8th floor in the Internal Revenue office in this building.

Q. Who was present?

A. Special agent Phoebus, special agent Schlick and attorney Stanley Anderson and attorney Joseph Brady. [211]

Q. Do you know whose attorneys they were?

A. They were attorneys for the Shubins, and I was present. Miss Caloway was the stenographer.

Q. Was Mr. Kissel there?

A. Not on that date. He was there at a later date.

The Court: Who else was present? Have you named everybody?

The Witness: Yes. Special agent Phoebus, special agent Bircher, attorneys Brady and Anderson. Miss Caloway, the stenographer, was present in the interview with William A. Shubin. During the interview with Frederick Shubin the same persons were present except Miss Ouida Dudney was the stenographer.

The Court: All right, proceed.

Q. By Mr. Strong: Did you in your investigation have anything to do with the Office of Price Administration? A. No.

(Testimony of Donald Oliver Bircher)

Q. And was this investigation you were conducting in any part of the Office of Price Administration?

A. No.

Q. Now, will you describe the procedure which was followed on July 24, 1945, in the conduct of the investigation which you described?

Mr. McLaughlin: Just a moment. Is this going to involve a statement as to discussions that took place, or is it [212] going to involve a description of how they came into the room and where they sat?

Mr. Strong: And what was done. Without going into the substance of the statements, just the mechanics of it.

Mr. McLaughlin: So long as he does not testify as to what somebody said, I have no objection, Mr. Strong.

Mr. Strong: All right.

The Witness: At my request attorneys Stanley Anderson and Joseph Brady had brought William Shubin and Frederick Shubin to our office to discuss their amended returns and I asked them if they were willing to make voluntary statements under oath and they said they were.

I advised them that any statements they made or might make or any documents produced during the taking of the statements might be used in any subsequent proceeding and that they were not required to incriminate themselves, and then I asked their attorneys whether they wished to advise them further along those same lines and they did, and after that both William Shubin and Frederick Shubin gave a sworn statement in answer to interrogatories and later came back to our office and reviewed them and signed them later.

(Testimony of Donald Oliver Bircher)

Q. By Mr. Strong: Was there a stenographer present? A. Yes.

Q. And did this stenographer take down the questions and answers? [213] A. She did.

Mr. Strong: May I have this marked for identification as Government's Exhibit, your Honor?

The Court: Yes.

The Clerk: Government's Exhibit 50 for identification.

(The document referred to was marked Government's Exhibit No. 50 for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 50 for identification which purports to be a sworn statement in question and answer form by William A. Shubin taken on July 24, 1945, and ask you if you have seen that before.

A. Yes. That is a copy of the original that I have here.

Q. Do you have the original with you? A. Yes.

Q. May I have it, please?

A. Yes. (Handing document.)

Q. And I show you the signature on page 23 of this statement and ask you whether you saw that signature placed on that page.

A. No, I did not. That was taken before special agent Phoebus.

Q. And was this statement, Government's Exhibit 50, turned over to you at any time by any of the defendants?

A. No. That was delivered to agent Phoebus and he [214] took their acknowledgment.

(Testimony of Donald Oliver Bircher)

Mr. Strong: May I have these two documents marked as Government's exhibit for identification?

The Clerk: Government's Exhibits 51 and 52 respectively for identification.

(The documents referred to were marked Government's Exhibits 51 and 52 respectively for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 51 for identification which is a sworn statement of Frederick A. Shubin taken on July 24, 1945, and ask you if you have ever seen that before.

A. Yes. That is the copy of the original that I have here.

Q. May I have the original, please?

A. Yes. (Handing document)

Q. And now I show you Government's Exhibit 52 for identification and ask you if you have seen that statement which purports to be a sworn statement of the defendant Jack Kissel taken on August 1, 1945.

A. Yes. I have the original of that statement here.

Q. May I have that, please?

A. Yes. (Handing document)

Q. Now, were you present at the taking of these three statements which are Government's Exhibits 50, 51 and 52? A. Yes. [215]

Q. Will you state who was present at the time of the taking of the statement on August 1, 1945, besides yourself?

A. The statement of Mr. Jack Kissel. We took that on August 1st and special agent Phoebus was there and Mr. Jack Kissel and attorneys for Mr. Kissel, Joseph Brady and Stanley Anderson and Miss Caloway, stenographer, and myself.

(Testimony of Donald Oliver Bircher)

Q. And as to the procedure which you described before which was followed in connection with the questioning, was that followed as to each of the three persons who are defendants in this case?

A. Yes, the same procedure.

Q. And they were all warned that the statements they made could be used against them?

A. That is right.

Q. Did they indicate that they were willing to make voluntary statements? A. Yes, they did.

Q. And were their attorneys present at all times during this? A. Yes.

Q. Now, you have been authorized by the Commissioner of Internal Revenue to appear in this proceeding and testify in this case?

Mr. McLaughlin: It calls for a conclusion. I submit the document is the best evidence, Mr. Strong. [216]

The Court: That is right.

Q. By Mr. Strong: Have you received any document from the Commissioner of Internal Revenue in connection with your giving of testimony in this case or before the grand jury or to the United States Attorney or in this trial? A. Yes.

Q. May I see it?

A. Yes. (Handing document) [217]

Mr. McLaughlin: Could I see that, Mr. Strong?

Mr. Strong: I was going to mark it first.

Mr. McLaughlin: Well.

Mr. Strong: Why don't you look at it?

Q. Now, did you disclose any information to me or to any of the agents of the Government concerning the

(Testimony of Donald Oliver Bircher)

matters in this case prior to receiving this letter of October 10, 1945 from the Commissioner of Internal Revenue?

A. No.

Mr. Strong: I think we might save time, possibly. Will counsel stipulate that the witness is authorized to give information?

Mr. McLaughlin: No, Mr. Strong, I will not. I think we had better submit the document to the court, because I am going to stand on my rights on that.

Mr. Strong: I would like to have this document marked for identification.

The Clerk: It will be Government's Exhibit No. 53 for identification.

(The document referred to was marked as Government's Exhibit No. 53, for identification.)

Mr. Strong: I offer it into evidence, your Honor.

The Court: Hand it to the clerk. The court has examined Exhibit No. 53 for identification. I will hear your objection, Mr. McLaughlin [218]

Mr. McLaughlin: Your Honor, I think there is no question pending as to which I have made an objection. I probably will when he offers the document.

Mr. Neukom: He offered it.

Mr. McLaughlin: Oh, I am sorry. Did you offer all three of those, Mr. Strong?

Mr. Strong: No. I offered the letter itself.

Mr. McLaughlin: I have no objection to the letter.

The Court: In evidence.

The Clerk: 53 in evidence.

(The document heretofore marked as Government's Exhibit No. 53, was received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 53]

[Crest] TREASURY DEPARTMENT

Office of Washington

Commissioner of Internal Revenue

Oct 10 1945

—
Address Reply to

Commissioner of Internal Revenue
and Refer to

GC:P:2CU

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Mr. Donald O. Bircher,

Office of the Special Agent in Charge,

San Francisco Division,

408 Alexander Building,

155 Montgomery Street,

San Francisco 4, California.

In re: Southern California Meat Company.

Southern California Meat Company No. 2.

Central Packing Company,

Vernon Hotel & Restaurant Supply Company.

Hyman Stillman,

Lou Segal or Siegal, and others

Los Angeles, California.

Dear Mr. Bircher:

The Department of Justice has requested that you be authorized to cooperate with United States Attorney Charles H. Carr of the Southern District of California

(Government's Exhibit No. 53)

relative to criminal proceedings against the above-named corporations and individuals for alleged violations of the Emergency Price Control Act. The United States Attorney has asked that you be allowed to testify in the trial of the case and furnish pertinent information and documents in your possession. Mr. Carr states that a Grand Jury investigation is now in progress presumably at Los Angeles, California. It appears that your testimony and cooperation is desired with respect to certain information obtained by you while making a preliminary investigation of the Southern California Meat Company and the members of a partnership called the Vernon Hotel and Restaurant Supply Company.

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You are hereby authorized to cooperate with Mr. Carr, to furnish any pertinent documents to his office, and to appear in response to a subpoena in any criminal proceeding as a witness for the Government, testifying as to the facts discovered in your investigation and as to any other material circumstances of which you have knowledge and in respect to which your testimony may be desired by counsel for the Government.

Very truly yours,

Wm. T. Sherwood

feh

Acting Commissioner.

[Stamped]: Internal Revenue 16 Oct 1945 Intelligence Unit.

No. 18367 Cr. Gov. Ex. 53 in Evid. 6/19/46. Cross.

(Testimony of Donald Oliver Bircher)

Q. By Mr. Strong: Will you examine Government's Exhibits 50, 51, and 52, and state whether, as far as you recall, this represents an accurate statement of the questions and answers that were given on these occasions?

Mr. McLaughlin: Objected to on the ground that it calls for a conclusion of the witness and the documents are the best evidence, and it is an indirect way of putting in evidence something that is otherwise not admissible. Your Honor, I might just as well——

The Court: The documents speak for themselves and until they are challenged, they purport to be the truth.

Mr. Strong: Is the objection sustained?

The Court: Yes. I say, the documents speak for them- [219] selves, and every document purports to speak the truth until it is challenged.

Mr. Strong: I will withdraw this witness. I am finished.

The Court: Question withdrawn.

Mr. Strong: That is all.

The Court: What is that exhibit number?

Mr. Strong: 50, 51, and 52.

Mr. McLaughlin: Are those offered yet?

The Court: Are those offered yet?

Mr. Strong: Not yet, your Honor.

The Court: All right. You have offered 51 or 50?

Mr. Strong: No. I have offered the letter, which is 53.

The Court: The letter, 53. All right; that is in evidence without objection on the part of the defense. All right; proceed.

Mr. Strong: All right. Cross examine.

The Court: You may cross examine, Mr. McLaughlin.

Mr. McLaughlin: I have no questions.

The Court: All right.

Mr. Strong: Mr. Thoebus.

SAMUEL J. THOEBUS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [220]

The Clerk: Your full name?

The Witness: Samuel J. Thoebus, T-h-o-e-b-u-s.

The Court: What is your business or occupation, Mr. Thoebus?

The Witness: Special Agent, Bureau of Internal Revenue.

The Court: Proceed.

Direct Examination

By Mr. Strong:

Q. Are you the Samuel J. Thoebus who was referred to here by Mr. Bircher a few minutes ago?

A. Yes, sir.

Q. And did you assist Mr. Bircher in connection with his investigation into the income tax returns of the defendants as testified? A. Yes, sir.

Q. And were you present on July 24, 1945 during the conference which Mr. Bircher described?

A. Yes, sir.

Q. Are you here under subpoena? A. Yes, sir.

Q. And have you received any letter from the Commissioner of Internal Revenue in connection with giving information in this case? A. Yes; I have.

Q. May I see it, please? [221]

(Witness producing paper.)

(Testimony of Samuel J. Thoebus)

Mr. Strong: I offer this letter as Government's Exhibit next in order.

Mr. McLaughlin: We have no objection, your Honor.

The Court: In evidence.

The Clerk: Government's Exhibit No. 54 in evidence.

(The document referred to was marked as Government's Exhibit No. 54, and was received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 54]

[Crest] TREASURY DEPARTMENT

Office of Washington 25

Commissioner of Internal Revenue

Oct 10 1945

Address Reply to

Commissioner of Internal Revenue

and Refer to

GC:P:TCU

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Mr. Samuel Phoebus,

Office of the Special Agent in Charge,

San Francisco Division,

408 Alexander Building,

155 Montgomery Street,

San Francisco 4, California.

(Government's Exhibit No. 54)

In re: Southern California Meat Company,
Southern California Meat Company No. 2,
Central Packing Company,
Vernon Hotel & Restaurant Supply Co.,
Hyman Stillman,
Lou Segal or Siegal, and others
Los Angeles, California.

Dear Mr. Phoebus:

The Department of Justice has requested that you be authorized to cooperate with United States Attorney Charles H. Carr of the Southern District of California relative to criminal proceedings against the above-named corporations and individuals for alleged violations of the Emergency Price Control Act. The United States Attorney has asked that you be allowed to testify in the trial of the case and furnish pertinent information and documents in your possession. Mr. Carr states that a Grand Jury investigation is now in progress presumably at Los Angeles, California. It appears that your testimony and cooperation is desired with respect to certain information obtained by you while making a preliminary investigation of the Southern California Meat Company and the members of a partnership called the Vernon Hotel and Restaurant Supply Company.

402579 to 402584, inc.

You are hereby authorized to cooperate with Mr. Carr, to furnish any pertinent documents to his office, and to appear in response to a subpoena in any criminal proceed-

(Government's Exhibit No. 54)

ing as a witness for the Government, testifying as to the facts discovered in your investigation and as to any other material circumstances of which you have knowledge and in respect to which your testimony may be desired by counsel for the Government.

Very truly yours,

Wm. T. Sherwood

hlc

Acting Commissioner.

No. 18367 Cr. Gov. Ex. 54 in Evid. 6/19/46. Cross.

Q. By Mr. Strong: Did you at any time prior to receiving this letter, Government's Exhibit 54, which is dated October 10, 1945, furnish to me or any official of the Government any information concerning the investigation which you were conducting?

A. No, sir; no official other than the Bureau of Internal Revenue.

Q. Well, you mean other than who were concerned with the investigation? A. Yes, sir.

Q. Anyone else? A. No, sir.

Q. And in this investigation were you investigating any matters for the OPA? A. No, sir.

Q. And did you furnish the Office of Price Administration any information of any kind that was disclosed as a [222] result of your investigation?

A. No, sir.

Q. Or received by you from any other source in connection with these matters that you were investigating concerning the defendants? A. I did not.

Q. Now, did you disclose certain information subsequent to the receipt of this letter? A. Yes, sir.

(Testimony of Samuel J. Thoebus)

Q. From the Commissioner of Internal Revenue, is that right? A. Yes, sir.

Q. I show you Government's Exhibits 50, 51, and 52 for identification and ask you whether you are the Samuel J. Thoebus who was present as shown on those documents at these conferences? A. I was and I am.

Q. You are? A. I was and I am.

Q. Were you present during the questioning, and the questioning of each of the defendants, as shown on these respective exhibits and the giving of their answers?

A. I was.

Q. And were you present when the defendants were informed as to the possible use of any statements that they made in other proceedings? [223]

A. I was.

Q. Were you present when they were warned that any statements they made might tend to incriminate them?

A. Yes.

Q. And were you present when their counsel indicated a willingness for them to give these statements?

A. Yes.

Q. I show you Government's Exhibit 51 for identification, page 9, which bears what purports to be the signature of Frederick A. Shubin, and ask you whether you saw that signature placed on that page? A. I did.

Q. And who placed that signature on that page?

A. Frederick A. Shubin.

Q. The defendant in this case? A. Yes, sir.

Q. And was that subscribed and sworn to before you?

A. Yes, sir.

(Testimony of Samuel J. Thoebus)

Q. Going back again to Government's Exhibit 51 for identification, calling your attention at the bottom of each page and in various places on the pages, there are the pages?

A. Yes, sir.

Q. And who placed those initials on those pages?[224]

A. Frederick A. Shubin.

Q. Now calling your attention to various changes made in the typewritten text of this statement, with the initials "F.A.S." opposite those changes, will you state who made those changes?

A. Frederick A. Shubin.

Q. And were those initials placed by him there?

A. Yes, sir.

Q. I show you Government's Exhibit 52 for identification, calling your attention to page 12, which has what purports to be the signature of Jack L. Kissel, and ask you if you saw that signature placed on that page?

A. I did.

Q. Who placed that signature on that page?

A. Jack L. Kissel.

Q. Was this statement subscribed and sworn to before you?

A. It was.

Q. Now calling your attention to the initials "J.L.K." which appear on the bottom of each of the pages of this statement, Government's Exhibit 52 for identification, did you see those initials placed on the bottom of these pages?

A. I did.

Q. And who placed those initials there?

A. Jack L. Kissel. [225]

Q. And the initials which are placed at various parts in the middle of the pages next to ink corrections of the typewritten text, who placed those there?

A. Jack L. Kissel.

(Testimony of Samuel J. Thoebus)

Q. As to these statements, were they read by the defendant Jack L. Kissel, that is, Government's Exhibit 52 for identification, before he signed it?

A. It was.

Q. Was it read in your presence? A. No.

Q. Was the statement given to him?

A. Yes, or his attorney. They went into a conference room.

Q. Could you speak up louder? I do not think the last juror can hear you.

A. He went into a conference room with his attorney to read it.

Q. And then they came out? A. Yes, sir.

Q. And then they signed in your presence?

A. Yes, sir.

Q. Is that true as to each of these documents, 51 and 52 for identification? A. It is.

Q. And calling your attention to Government's Exhibit [226] 50 for identification, page 23, which bears the signature of the name William A. Shubin, signed, can you state who signed that name?

A. William A. Shubin.

Q. Was that done in your presence?

A. Yes, sir.

Q. Is that the defendant William A. Shubin in this case? A. Yes, sir.

Q. And each of these pages bears the initials "W.A.S." Do you know who placed those initials on these pages? A. William A. Shubin.

Q. Was that done in your presence? A. It was.

Q. And was this statement subscribed and sworn to before you? A. It was.

(Testimony of Samuel J. Thoebus)

Q. By William A. Shubin? A. Yes, sir.

Q. And on the date shown on the statement?

A. Yes, sir.

Q. That is true as to the others, too?

A. Yes, sir.

Q. These changes, for example, which appear in the typewritten text and with the changes being in ink, just for [227] example on page 11 of this statement which is Government's Exhibit 50 for identification, did you see those ink changes placed on that page? A. I did.

Q. Who placed them there?

A. That is not clear exactly who did. Either his attorney or, in some cases, I put them on there.

Q. And how did you happen to put them on there?

A. Well, there were many copies and we were rushing through this routine job, and I don't know whether there are any actual instances of my putting on there, although I think I might have made some of the corrections.

Q. Showing you the original of Government's Exhibit 50 for identification, the same page 11, were you present when these ink changes were put on that page?

A. Yes, sir.

Q. And do you know who put them there?

A. I don't recognize the handwriting.

Q. The initials "W.A.S." opposite each of the changes, was that put on in your presence? A. Yes, sir.

Q. And who put it there?

A. William A. Shubin.

Q. That is the defendant William A. Shubin?

A. Yes, sir. [228]

(Testimony of Samuel J. Thoebus)

Q. And did the defendant William A. Shubin read this statement, Government's Exhibit 50 for identification, before he signed it and initialed each page?

A. Yes, sir.

Q. Was the same procedure followed as in the case of the others that you have described? A. Yes.

Mr. Strong: I offer these statements into evidence, your Honor, Government's Exhibits 50, 51, and 52.

Mr. McLaughlin: Your Honor, the defendants object to the introduction of each of the documents into evidence on the ground that there is no foundation established for their introduction; and on the ground that under the statutes and laws relating to returns and documents which are incidental, and parts of returns, the procedure has not been followed by the Government as prescribed by that statute in obtaining such documents, and therefore they are here without the proper lawful authority from the Commissioner of Internal Revenue.

Now, the regulation which permits the use of a return or an amendment to a return or anything in evidence specifies that it can be furnished upon written request of the Attorney General, the assistant to the Attorney General, or the Assistant Attorney General.

Now, therefore, there is no proof here that any of those parties ever made such a written request; and that is one of [229] the elements that is specified in this regulation.

The next thing is, the only person who could possibly furnish them is the Commissioner, and the documents which have been offered into evidence as the authority of these two gentlemen—I have Mr. Thoebus' here in my hand—is nothing more than a letter to Mr. Thoebus which

is signed by somebody with the stamp "Acting Commissioner," and it does not specify these particular statements or anything else. It is vague and indefinite and general; and it is more or less a power of attorney to this man to give whatever he thinks is necessary and to enter into court and give testimony. And I submit that neither the statute relating to returns nor the regulation were ever intended to encompass such loose procedure as that, otherwise there would be no purpose of having this statute.

Undoubtedly the reason for this statute is that the Government wants to afford a certain amount of privacy to tax returns and to statements made. They want to encourage people to pay their taxes and they do not want them to be open to every person on earth; so they vested authority in the Commissioner. They did not vest it in the Acting Commissioner or the Assistant Commissioner or anybody else.

Here the Acting Commissioner has purported—not to furnish anything to the Government's attorney—but all he did is just said, "You go ahead and help these gentlemen." [230] That is in substance what he says here.

And furthermore, the other element: There are two people who must participate in this; it must be either the Attorney General or the Assistant Attorney General who must request it—yes; an assistant to the Attorney General or an assistant Attorney General. It must be shown that they request it. That authority can't be delegated.

Secondly, the request must be to the Commissioner and he is the man who must grant the authority, and he has not granted it; it is someone else.

Your Honor is familiar with these recent decisions dealing with this delegation of authority. I just picked this one up in the Los Angeles Daily Journal. It was a

statement by Judge Beaumont, wherein he held that when authority was granted to the Administrator, Chester Bowles, that that did not mean that Chester Bowles could delegate that authority to other parties. That was a case that dealt with the issuance of subpoenas.

And I submit that the purpose of these regulations and statutes is going to be nullified and destroyed if we can permit documents to go in on this kind of proof, and therefore that there is no proper foundation.

Mr. Strong: I just would submit, your Honor, the letter on its face discloses that the Department of Justice has requested you to cooperate with the United States Attorney— [231] that is referring to Mr. Bircher. I think your Honor can take judicial notice that the Department of Justice is represented by the Attorney General, and that everything that is done by the Department of Justice is done in the name of and through the Attorney General of the United States.

The procedure here was fully complied with. As to the Acting Commissioner, the Acting Commissioner is the Commissioner while he is acting, and that is why they call him "Acting Commissioner," because he is taking the Commissioner's place. He is the Commissioner at the time he is acting.

The Court: Let me look at that again, please.

Mr. McLaughlin: Your Honor, could I add one other objection when you are ready?

The Court: Certainly.

Mr. McLaughlin: Mr. Strong stated that it referred to the Department of Justice. I submit that letter is not proof itself of the fact that the Attorney General or an Assisant Attorney General made such request. It is not the best evidence.

Mr. Strong: I might submit, your Honor, that there is a presumption of regularity in official dealings of this type. Furthermore, I wish to call your Honor's attention to *Gibson v. United States* which I have here. (31 Fed. (2d) 19.)

The Court: All right.

Mr. Strong: Which goes into considerable detail, and it [232] deals with an affidavit.

The Court: Just let me have that point. Read that point.

Mr. Strong: Point 3.

"Over objection the court received in evidence an affidavit made by defendant Curtis in August, 1927, about 6 months after the indictment was returned. Curtis delivered the affidavit to a Deputy Collector of Internal Revenue, with the assurance on the part of the deputy that it would be considered only as bearing on affiant's income tax obligations, and would not be used against him in any case pending in court. It is in the nature of a supplementary return, and the statements therein made bear somewhat remotely upon the question of Curtis' guilt."

And then it goes on as to its admissibility.

And then here is the section that deals with the process of getting it in:

"The Deputy Collector was incompetent"—and talks about the admissions, privacy of income tax returns, and it says:

"The Deputy Collector was incompetent to waive such right, if any, as the Government had under the law to make use of the affidavit as evidence, and [233] the remaining question is of such right. By a rule of the Treasury Department * * * it is provided that upon the written

request of the Attorney General, or one of his assistants, an income tax return or a copy thereof may be furnished by the Commissioner to a United States Attorney for use as evidence in any litigation in court, where the United States is interested in the result. Or, if the return is in the possession of a Collector, it may, upon the conditions stated, be furnished by him. When the return or a copy thereof is obtained, its use is to be limited to the purpose for which it is furnished, and unnecessary publicity is to be avoided."

Then it goes on to say:

"The record shows that, following a telegram from the District Attorney to the Attorney General, requesting that authority be secured from the Department for the use of the affidavit,"—and there is nothing here about anything from the Attorney General.

"a telegram was received by the Collector having custody of the affidavit, from the Commissioner,"—

There is no signature here, either, as we have in this case. [234]

"directing him to produce it and to furnish a copy thereof, if a copy was desired by the District Attorney. Indulging the presumption of official regularity, we think this was sufficient to warrant what was done."

This is the Circuit Court of Appeals for the Ninth Circuit. There, of course, was simply a letter sent from the United States Attorney here to the Attorney General—a telegram, rather, and the only other thing was a telegram to the person who was to testify, authorizing him.

In this case we have a specifically signed letter by the Acting Commissioner of Internal Revenue to these people, directing them to testify, and it refers on its face to the

fact that there was a request by the Department of Justice made.

I think that the presumption of official regularity follows these proceedings. If your Honor desires any further proof of the fact that we requested these, I can, within a few minutes, go to my office and produce the letter which I sent, making this request, a letter which was addressed to the Attorney General, which would possibly be comparable to the telegram that was sent in the Gibson case which I have just read to your Honor.

Mr. McLaughlin: Your Honor, I have that Gibson case here and I do not believe that that Gibson case is an [235] authority for the proposition that the Commissioner can delegate his authority to determine whether one of these returns can be used in evidence. And furthermore, I do not believe that it is——

The Court: Did he delegate it?

Mr. McLaughlin: I don't think so.

The Court: No, no. I say, in this instance did he delegate it?

Mr. McLaughlin: Yes; the Acting Commissioner did it.

The Court: Then, if there is a vacancy in the office of the Comptroller of the Currency or of the Commissioner, then the whole administrative functions are paralyzed for a year because no one can act. Here is the Acting Commissioner.

Mr. McLaughlin: Well, the law said the Commissioner, not any Acting Commissioner.

The Court: Well, but the law does say that. The general statute is that where the head of the bureau either resigns or dies or is incapacitated or the appointment has

lapsed, in all of those bureaus then the acting deputy or the acting Commissioner shall be the one who shall assume all the powers of the head of the Department.

Mr. McLaughlin: Well, your Honor, that is true; but my point is, I do not think that in this connection they intended it to be such, because the same law exists with respect to the Attorney General, and when he is not acting, [236] then the Assistant Attorney General has his power.

The Court: That is right.

Mr. McLaughlin: And when the Treasury Department drew up this regulation, they specifically said: "for like use upon the written request of the Attorney General, Assistant to the Attorney General, or an assistant Attorney General."

Now, they specify it.

The Court: That is right.

Mr. McLaughlin: I say here that they have not specified that an Acting Commissioner nor an Assistant Commissioner.

The Court: No. But the general statute provides that if the Commissioner is dead or resigns or there is a lapse, that the Acting Commissioner shall perform all the functions of the Commissioner. That is the statute, and very clearly.

Mr. McLaughlin: Yes; I understand your point, your Honor.

The Court: But I am pleased that you put in the record, and it is proper for counsel to put in the record,

to call the court's attention to all of these intricacies of the law. That is not only proper but it is the duty of the lawyer to do it.

Mr. McLaughlin: Yes, your Honor. Thank you.

Your Honor, I want to add this: That I still do not think that there is any evidence that the Assistant Attorney General or the Attorney General requested this. Mr. Strong [237] says he wrote a letter on it, and that is as far as it goes; and that is a necessary incident, also, that it was requested by the Attorney General, or the Assistant to the Attorney General, one or the other. There is no proof that such was done.

Mr. Strong: I think in that respect, your Honor, the Gibson case is a full answer to that phase of the contention, because there in that case, as I pointed out, the only proof was the telegram from the District Attorney to the Attorney General, and the next step was a telegram from the Commissioner to the person who was to testify. There wasn't any evidence there of anything going from the Attorney General to the Commissioner, and yet the Circuit Court of Appeals said that, indulging the presumption of official regularity, we think this was sufficient to warrant what was done.

The Court: I think you should produce your communication to the Attorney General so as to connect it up, if you can.

Mr. Strong: Yes, your Honor. I can within five minutes.

The Court: Proceed with any other matters you have. The ruling will be withheld.

Mr. Strong: Our case at this point hinges on these statements; so if we might have a recess?

The Court: We will take our usual afternoon recess. [238]

(The court admonished the jury and a recess was taken.)

The Court: Stipulate the jury is present, gentlemen?

Mr. Strong: So stipulated.

The Court: Stipulate the defendants are in court?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: You may proceed.

Mr. Strong: At this time, your Honor, I have here three letters which I would like to have marked as one, and the first is a carbon copy of a letter which I wrote, had written, and was sent by the United States Attorney to the Attorney General of the United States on September 27, 1945, requesting the Attorney General to contact the Commissioner of Internal Revenue and secure his authority for these agents to testify at the trial of the case, one of which is named here, and to furnish such information and documents as are in their possession, the agents'.

Then, I also have found as part of our official files a reply from the Department of Justice in Washington, D. C., over the signature of the Assistant Attorney General of the United States, which refers to my letter of September 27th, and says that in compliance with it the

No. 11382

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM SHUBIN, FREDERICK ALEXANDER
SHUBIN and JACK L. KISSEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 293 to 591, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

DEC - 4 1946

PAUL P. O'BRIEN,
CLERK

No. 11382

IN THE

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TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 293 to 591, Inclusive)

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

request was taken up with the Commissioner of Internal Revenue and that, as a result of that request, a letter was received from the Commissioner of Internal Revenue addressed to the Assistant [239] Attorney General, in which he granted the request, and they enclosed a copy of the letter which the Commissioner of Internal Revenue sent in reply to this letter of the Assistant Attorney General. And I offer these now as Government's exhibit next in number.

The Court: Has counsel examined them?

Mr. McLaughlin: Yes, I have, your Honor. And I do not make any objection to the introduction of any of these documents and accept Mr. Strong's statement that the original of the letter dated September 27, 1945, copy of which he has here, was sent by him to the Attorney General on or about the 27th day of September.

There being no objection to these documents, I assume they will go in with an exhibit number. As soon as they are offered into evidence, I want to make a further observation with respect to the statements of the three defendants that I represent.

The Court: Mark them, Mr. Cross.

The Clerk: Government's Exhibit No. 55 in evidence.

The Court: No. Offered in evidence until the defense makes its objection.

Mr. McLaughlin: I make no objection to those. They may go in, your Honor.

The Court: All right; they are in evidence.

The Clerk: 55 in evidence. [240]

(The documents referred to were marked as Government's Exhibit No. 55, and were received into evidence.)

[GOVERNMENT'S EXHIBIT NO. 55]

WS/BVB

September 27, 1945

The Attorney General
Department of Justice
Washington 25, D. C.

In re: Southern California Meat Company,
Southern California Meat Company No. 2
Central Packing Company
Vernon Hotel & Restaurant Supply Co.
Hyman Stillman
Lou Segal or Siegal, and others

Your Reference:

Sir:

In the above-entitled matters the defendants are to be charged with conspiracy to violate, and with various violations of the Emergency Price Control Act.

We are now in the process of conducting a Grand Jury investigation into the activities of these companies and individuals. Agents of the Bureau of Internal Revenue, in connection with income tax returns of the named individuals and concerns, appear to have been furnished certain information which will be very pertinent to the trial of the case arising from the instant investigation.

Will you please secure the authority of the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus, and Internal Revenue Agent J. Bryant Eustice to testify on the trial of the above-

(Government's Exhibit No. 55)

entitled case, and to furnish such information and documents as are in their possession, pertinent to said case?

Respectfully,

CHARLES H. CARR,
United States Attorney.

Address Reply to
"The Attorney General"

and Refer to DEPARTMENT OF JUSTICE

Initials and Number Washington, D. C.
TLC:CBM:vng October 5, 1945
146-18-50-538 air mail

Charles H. Carr, Esq.,
United States Attorney,
Los Angeles, 12, California.

Dear Mr. Carr:

Re: Southern California Meat Company,
Southern California Meat Company No. 2,
Central Packing Company,
Vernon Hotel & Restaurant Supply Co.,
Hyman Stillman,
Lou Segal or Siegal, and others
(Emergency Price Control Act).

In compliance with your request of September 27, 1945, for the Department to secure authority from the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the above cases and to furnish such information and documents as are in their possession pertinent to the cases, it was believed

(Government's Exhibit No. 55)

from your letter that you desired that authority at our earliest convenience. Therefore, we took the matter up direct with the office of the Commissioner of Internal Revenue.

We are in receipt of a letter dated October 5, 1945, from the Commissioner granting the request. Enclosed herewith you will find a copy of the letter.

Respectfully,

For the Attorney General,

Theron L. Caudle

THERON L. CAUDLE,

Enc. #93643.

Assistant Attorney General.

[Stamped]: Received Oct 8 1945 U. S. Attorney Los Angeles, California

GC:P:TCU

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Oct 5 1945

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Hon. Theron L. Caudle,

Assistant Attorney General,

Department of Justice,

Washington 25, D. C.

In re: Southern California Meat Company,
Southern California Meat Company No. 2,
Central Packing Company,

(Government's Exhibit No. 55)

Vernon Hotel & Restaurant Supply Co.,
Hyman Stillman,
Lou Segal or Siegal, and others
(Emergency Price Control Act.)

Dear Mr. Caudle:

Reference is made to your letter dated October 4, 1945, enclosing a copy of a letter dated September 27, 1945, from the United States Attorney for the Southern District of California. In his letter the United States Attorney states that a grand jury investigation is being conducted with a view to ascertaining whether any of the above-named taxpayers have violated the Emergency Price Control Act. The United States Attorney also states that certain investigating agents of the Bureau while making an income tax investigation have obtained certain information that will be pertinent in any trial of the taxpayers arising from their indictment for violations of the Emergency Price Control Act. The United States Attorney requests that you secure authority for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the cases and to furnish such information and documents as are in their possession pertinent to said cases. In your letter you request that the Bureau cooperate with the United States Attorney.

(Government's Exhibit No. 55)

402579 to 402584, inc.

In accordance with your request authority will be given the special agents and the revenue agent to furnish the United States Attorney such information and documents as may be in their possession regarding the violations of the Emergency Price Control Act by the above-named taxpayers and, upon proper subpoena, to testify at grand jury proceedings and at the trial of the taxpayers in the event that they are indicted for violations of that Act.

Very truly yours,

(Signed) W. T. Sherwood

hlc

Acting Commissioner.

Case 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 55 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Mr. McLaughlin: I want to make this observation: There is none of this correspondence which has passed between Mr. Strong and the Assistant or the Attorney General which relates to any returns of any of the three defendants in this case at all. I want to read off from the top of those the mention of the firms and concerns which are dealt with. The letter of Mr. Strong, which is dated on the 27th of September, 1945, says:

"In re: Southern California Meat Company, Southern California Meat Company No. 2, Central Packing Com-

pany, Vernon Hotel & Restaurant Supply Company, Hyman Stillman, Lou Segal or Siegal, and others.”

Your Honor, there isn't anything in there that refers to any of the Shubins; and I submit that a communication cannot come within the terms of the regulation when it says: I want the firms of X corporation, the Standard Oil Company, and its stockholders and others. And I submit that it is no compliance with the regulation. And all of the letters which follow have the same reference. In other words, there is no direct reference to the Shubins, and that is what we are [241] concerned with in this case.

The Court: But the evidence here shows that the Vernon Hotel and Restaurant Supply Company is the defendants.

Mr. McLaughlin: Your Honor, as far as the returns of that partnership are concerned, that may be true. But these are individual statements that we are dealing with here now, and I submit that there is a distinction between a firm and the parties who may be interested in it.

They knew at the time they wrote that letter that the Shubins were in existence and they could have named them. They named Mr. Stillman or Mr. Segal. They could have named other persons but they did not name them. It may be that a return filed by the partnership is covered by that. I am indifferent about that, your Honor. But I think, as far as these individuals are concerned, there is no showing within the regulation that any of their returns or documents were properly requested or obtained.

The Court: The record here shows, and it has been stipulated, that the Vernon Hotel & Restaurant Supply Company was a partnership consisting of the three de-

fendants in this case. The request, then, in this letter of September 27, 1945, would not refer, it seems to me, to anyone except those who composed that partnership.

Mr. McLaughlin: There are partnership returns, your Honor. The partnership has filed a return. [242]

The Court: Certainly.

Mr. McLaughlin: And they are here and it may be that they are covered. But I submit that it does not cover individuals.

Let us assume that instead of three partners there were 12, or let us assume they had a limited partnership with 50. I submit that a communication like that does not come within the requirements of that regulation or statute, and hasn't any force or effect. There should be some pretense of a literal compliance with it.

Mr. Strong: I submit, your Honor, that the letters do not only request for returns, as counsel seems to have thought from the face of the letters, but requests authority for these agents to give all information and documents necessary.

If your Honor will notice, besides the name of the company itself, the partnership, which intended to include anybody embraced, it gives the names of two particular individuals concerning whom we had some information at that time, and that time was the start of the investigation; and after the names of the individuals, we specifically said "and others", and that authority is in the same terms. So that, besides being covered by the fact that the partnership name is in there and we were requesting authority for these agents to give us information and documents relative to everybody comprising that partnership, we definitely cover [243] anyone else required to be

testified about in that investigation by including the words "and others"; so that there were two places where it was actually covered. [244]

The Court: Oh, I wouldn't go that far. I wouldn't say that you could put in a general clause and then include anybody in the United States by the addition of the words "and others." In other words, the government could contend that because they said "and others" that would include anybody they desired to bring in. I couldn't follow you that far.

Mr. Strong: Well, at any rate, your Honor, the name of the partnership itself was to include all the partners, I think. It clearly does.

The Court: Well, it does disclose the partnership in the name. It says "Vernon Hotel and Restaurant Supply Company." Now, that is all you asked for.

Mr. Strong: At the outset of the investigation before the grand jury we don't have all the details which develop subsequently.

The Court: That is true. I agree with you there, but that wouldn't justify a non-compliance with the statute, would it?

Mr. Strong: No, but I submit by giving the name of the concern and asking for information concerning it——

The Court: Well, that is concerning the partnership.

Mr. Strong: And the information we got was that the partners were so-and-so and other details which we asked for was any testimony and documents which were in their possession.

I think the authority to the agents is broad enough to [245] cover all these aspects.

I might submit further that the sole question as I see it with reference to this entire situation of authority is one which goes to the statute itself and to the agents' actions in these cases. Now, I think that it might be possible under some circumstances for agents to testify despite the fact that they have no authority. It may later appear that they weren't authorized to do so, but their testimony can be taken and here we submit that their testimony is being taken pursuant to specific authority of the Commissioner of Internal Revenue to these individuals to disclose whatever information they have in their possession respecting the Vernon Hotel and Restaurant Supply Company, and of course that was a partnership as was disclosed during the investigation.

Mr. McLaughlin: May I add, your Honor, the partnership is not on trial in this case. This is an indictment against three individuals and Mr. Strong has had since way last fall in which to comply with the law. We have been liberal insofar as we could by cooperating with him in this case, but I submit that that regulation, if it is going to mean anything, it is going to mean that they have to ask for the returns of the persons that they are driving at and not some general name and then say, "and others."

Otherwise everybody is open to jeopardy. [236]

The Court: During the recess I read the *Gibson v. United States* in 31 Fed (2d) commencing at page 19 and particularly on page 22 the opinion by Judge Dietrich of the Ninth Circuit, and that refers to a definite affidavit and a definite individual who had given the affidavit which was made by the defendant Curtis in August of 1927.

Mr. Strong: May I go on?

The Court: Go on if you have any other comment.

Mr. Strong: Yes. Now, in connection with the investigation from time to time it was necessary for me to write for certain additional documents.

The Court: Yes.

Mr. Strong: And in that connection these defendants were specifically named in the letters and the answers which we have received also have in them the names of these defendants, but I am in a very peculiar position here because in the caption of these other letters there have been added the names of other persons who are being investigated and as to whom I don't think the disclosure is proper since the investigation has not been completed, and I have been going through here while your Honor was looking at that, trying to see if I had some such letter which does not also simultaneously name the other parties we have been investigating, and so far I have come across one letter which has the defendants' names in it but in the caption it has this other party's name that [247] we are investigating.

The Court: But now, assuming that is correct, would it not be necessary in order to comply with the statute to get the same authority in order to secure the information that you requested from the Commissioner?

In other words, counsel, the statute was passed by Congress for a definite purpose and a very proper purpose and that was to keep as secret in the files of the government of the United States all of the returns on of taxpayers.

The same applies to examinations of national banks and heavy penalties are imposed upon divulging any information secured by those departments.

Now, Congress saw fit to make some exceptions, and in order to take advantage of those exceptions the statute in my opinion must be strictly complied with.

Mr. Strong: The provisions of the statute refer to regulations of the Commissioner of Internal Revenue in that respect.

The Court: Yes.

Mr. Strong: They provide specifically that in effect where the testimony under disclosure is authorized by the Commissioner of Internal Revenue that it can be made.

The Court: That is right. There is no dispute about the statute.

Mr. Strong: Well, it seems to me that what this reduces [248] down to is that there is apparently no dispute about the statute or regulations, but simply whether the name of Vernon Hotel and Restaurant Supply Company covers the individual defendants, and I think that the three letters taken together, your Honor, will show that what was being investigated was everybody who was concerned with that partnership, and that the information and disclosures sought were with reference to everybody concerned with that partnership, and that the authority was being granted to my mind in general terms to include everybody who was concerned with that partnership as a person constituting that partnership.

The Court: Well, now, do you find that anywhere in the regulation of the statute?

Mr. Strong: I haven't looked at it yet in connection with that. Has your Honor done so?

The Court: I couldn't possibly go that far, counsel. I was in doubt about the Government's Exhibit 54. The first sentence reads:

"The Department of Justice has requested that you be authorized to cooperate with the United States Attorney, Charles H. Carr, Southern District of California, relative to criminal prosecutions against the above-named corporations and individuals for alleged violations of the Emergency Price Control Act." [249]

Now, there is the acting commissioner Sherwood's direction to the agent, Mr. Samuel Phoebus in the San Francisco office of special agent in charge on October 10, 1945. That sentence is very clear. He limits the authority of Mr. Phoebus to "the above-named corporations and individuals for alleged violations of the Emergency Price Control Act."

He does not say to anybody else that the United States Attorney might see fit to examine. Now, there is the further comment:

"The Department of Justice has requested—"

That, of course, should be read in the language of the statute, the Attorney-General or the assistant to the Attorney-General, but that is cleared up, that part of the exhibit is cleared up in Government's Exhibit 55, the letter from the Department of Justice to Charles H. Carr, signed by Theron L. Caudle, Assistant Attorney-General, dated October 5, 1945, reading as follows:

"In compliance with your request of September 27, 1945, for the Department to secure authority from the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus and Internal Revenue Agent J. Bryant Eustice to testify at the trial of the above cases and to furnish such information and documents as are in their possession pertinent to the cases, it was [250] believed from your letter that you desired that authority

at our earliest convenience. Therefore, we took the matter up direct with the office of the Commissioner of Internal Revenue.

"We are in receipt of a letter dated October 5, 1945, from the Commissioner granting the request. Enclosed herewith you will find a copy of the letter."

That is sufficient to clarify the indefiniteness as I have stated in the Treasury Department's letter of October 10, 1945, marked as Exhibit 54 and particularly in view of the rather liberal construction in *Gibson v. United States*, 31 Fed. (2d) at page 22.

I am going to sustain the objection of the defense. I don't believe there is sufficient authority.

Mr. Neukom: May I make one observation before you do so, your Honor?

The Court: Yes.

Mr. Neukom: We have got to consider that this indictment charges that these defendants operated under the name of the Vernon Hotel and Restaurant Supply Company. They operated entirely as a partnership. Your Honor, I don't believe, can make this ruling without having read the statements that were taken at this time in question because it will be very apparent in reading for instance from Govern- [251] ment's Exhibit 51, if you will read page 2, it is very obvious that the Vernon Hotel and Restaurant Supply Company's aspects, their operations which can only function through the partners, were very material to that investigation. Hence, as they are

charged in this conspiracy charged here, operating under their fictitious name as co-partners and of doing these acts which are contrary to the OPA, I feel that even though it would have been preferable to have asked for the individual returns or to ask for the information as to the parties as individuals, that still when they replied in the capacities here as members of the firm of the co-partners and as is only apparent from reading that if your Honor will say that a strict literal application would be erroneous in a case of this character.

The Court: But counsel, there is no question at all that these individuals are the Vernon Hotel and Restaurant Supply Company. There is no question in the record at all about that.

Mr. Neukom: No.

The Court: Not only that but it has been stipulated by the defense counsel that they were partners in the operation, operating under the name of the Vernon Hotel and Restaurant Supply Company.

Mr. Neukom: Yes.

The Court: Now, there is no request made under the [252] statute for the information with reference to these individuals. Now, can the court so contrive that statute and say, "Well, it doesn't make any difference. We have got a name here anyway and anybody that is connected with that company, we can secure their returns?"

I assume that the Attorney-General and the Commissioner of Internal Revenue act with discretion under the

statute. Now, the request was for the Vernon Hotel and Restaurant Supply Company, information about that company.

Mr. Neukom: Which is a co-partnership. Pardon my interruption.

The Court: Suppose there were 50 partners and the Attorney-General I assume would go down through there and say, "Here are five that we didn't make a request for for some reason. We will not permit that information to be divulged. We have other matters pending, or there are other matters in the Department so that we cannot furnish that."

I assume that they all act with discretion. I don't believe that they just act without any consideration, otherwise the statute would be meaningless.

Now, the Attorney-General and the Commissioner of Internal Revenue have no information as far as these letters are concerned that the United States Attorney here desires information with reference to individuals and particularly [253] when the United States Attorney did name individuals in connection with another case that I believe is pending in this court.

Mr. Neukom: I am not acquainted with that.

The Court: Yes, I think so. No, Mr. Neukom, I am going to sustain the objection.

Mr. Neukom: I don't wish to keep urging the matter, but I do sincerely believe that my point is well taken that when you ask for partnership matters and when it is——

The Court: You did not ask for a partnership matter.

Mr. Neukom: We asked for the Vernon Hotel and Restaurant Supply Company and when the factual proposition is that that is a partnership matter, is it necessary

for one government agency to write to another to go and explain each and every one of its factors when the truth of the matter is ascertainable and is known and is available in records that had been taken previously? Is it necessary for the government to go and set up from one of their inter-departmental memorandums all of those factual matters?

The Court: No. I will answer that very simply. Here you have asked for certain individual returns and I assume that the government is furnishing those to you, but when you don't ask for any, you omit entirely from your request certain others.

Mr. Neukom: I would agree if it was a corporation be- [254] cause we all know that corporations, entities change from day to day. In other words, you may be a stockholder today and you may not be tomorrow.

The Court: I will sustain the objection.

Mr. Strong: May I be heard?

The Court: No, I have heard enough. We will go on to the next matter.

Mr. Strong: May I withdraw this witness for the present time, your Honor, and recall him tomorrow?

The Court: Yes.

Mr. Strong: Mr. Eustice.

JAMES BRYANT EUSTICE

called as a witness on behalf of the government, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: James Bryant Eustice.

The Court: What is your business, Mr. Eustice?

The Witness: Internal Revenue Agent.

(Testimony of James Bryant Eustice)

The Court: How long have you been Internal Revenue Agent?

The Witness: About four years.

The Court: During all the time that is named in this indictment?

The Witness: Yes, sir.

The Court: All right, proceed.[255]

Direct Examination

By Mr. Strong:

Q. Mr. Eustice, during 1945 did you in your official capacity have occasion to investigate the income tax returns of the Vernon Hotel and Restaurant Supply Company? A. Yes, sir, I did.

Q. And did you some time in the past, during the last year, receive authority from the Commissioner of Internal Revenue to give certain information in connection with that matter to the United States Attorney or his assistants? A. Yes.

Mr. McLaughlin: Well, that is objected to as a conclusion. I submit he has some written documents.

Mr. Strong: Yes. I am going to call for it now.

Q. Do you have that authority in writing?

A. Yes.

Q. May I see it?

A. Yes. (Handing document.)

Mr. Strong: Counsel will stipulate that this may be offered in evidence.

The Court: In evidence.

The Clerk: Government's Exhibit 56 received in evidence.

(The document referred to was received in evidence and marked as Government's Exhibit No. 56.)

[GOVERNMENT'S EXHIBIT NO. 56]

[Crest] TREASURY DEPARTMENT

Office of Washington

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

GC:P:TCU

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Oct 10 1945

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Mr. J. Bryant Eustice,

Office of the Internal Revenue Agent in Charge,

Subway Terminal Building,

417 South Hill Street,

Los Angeles 13, California.

In re: Southern California Meat Company,

Southern California Meat Company No. 2,

Central Packing Company,

Vernon Hotel & Restaurant Supply Company,

Hyman Stillman,

Lou Segal or Siegal, and others

Los Angeles, California.

Dear Mr. Eustice:

The Department of Justice has requested that you be authorized to cooperate with United States Attorney Charles H. Carr of the Southern District of California

(Government's Exhibit No. 56)

relative to criminal proceedings against the above-named corporations and individuals for alleged violations of the Emergency Price Control Act. The United States Attorney has asked that you be allowed to testify in the trial of the case and furnish pertinent information and documents in your possession. Mr. Carr states that a Grand Jury investigation is now in progress presumably at Los Angeles, California. It appears that your testimony and cooperation is desired with respect to certain information obtained by you while making a preliminary investigation of the Southern California Meat Company and the members of a partnership called the Vernon Hotel and Restaurant Supply Company.

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You are hereby authorized to cooperate with Mr. Carr, to furnish any pertinent documents to his office, and to appear in response to a subpoena in any criminal proceeding as a witness for the Government, testifying as to the facts discovered in your investigation and as to any other material circumstances of which you have knowledge and in respect to which your testimony may be desired by counsel for the Government.

Very truly yours,

Wm. T. Sherwood

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Acting Commissioner.

No. 18367 Cr. Gov. Ex. 56 in Evid. 6/19/46. Cross.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: And did you at any time during your [256] investigation prior to receiving the letter reveal any information to anyone outside of your agency?

A. No, sir, I did not.

Q. Now, in connection with your investigation, about when was that conducted?

A. Do you mind if I refer to my notes?

Mr. McLaughlin: I can't hear you.

The Witness: I asked if I might refer to my notes as to the time.

Mr. McLaughlin: I have no objection to Mr. Eustice looking at his notes to fix a time.

The Witness: My first contact with the Shubins was on August 7, 1945, in the special agent's office.

Q. By Mr. Strong: And was that contact in connection with your investigation of the Vernon Hotel and Restaurant Supply Company?

Mr. McLaughlin: That is objected to as calling for a conclusion.

The Court: Oh, no. Overruled. That is a very petty objection.

The Witness: Yes, it was.

Q. By Mr. Strong: And will you state the first time that you contacted any one of the defendants in this case in connection with your investigation of the Vernon Hotel and Restaurant Supply Company? [257]

A. The first date I went to their office was on August 11, 1945. I began the audit at that time.

Q. What was the purpose of your call at the office which you have just described?

A. It was to make an audit of the books and records of the Vernon Hotel and Restaurant Supply Company,

(Testimony of James Bryant Eustice)

as well as an income tax investigation as to the accuracy of the figures in the amended returns.

Mr. McLaughlin: Would you speak up, please?

The Court: Will you speak a little bit louder? Miss Bennallack, read the answer.

(Answer read.)

Q. By Mr. Strong: That was the returns of the Vernon Hotel and Restaurant Supply Company?

A. Yes, it was. It also included the individual returns.

Q. I show you Government's Exhibits 46, 47, 48 and 49 for identification, and ask you whether these are the returns that you referred to as the returns of the Vernon Hotel and Restaurant Supply Company. (Handing documents.)

A. Those are the partnership returns that were being audited, yes.

Q. On this first occasion when you went to the office of the Vernon Hotel and Restaurant Supply Company, who did you speak to then? [258] A. Well—

Q. Of the defendants, I mean, if any of them.

A. I believe the three of them were there at that time.

The Court: Will you speak a little louder so that everyone can hear you?

The Witness: I believe the three of the defendants were there at that time.

Q. By Mr. Strong: And did you have a discussion with any of the defendants concerning the returns or the income of the Vernon Hotel and Restaurant Supply Company?

A. You mean at that particular time?

(Testimony of James Bryant Eustice)

Q. Yes. A. Yes, I did.

Q. Now, did you have subsequent conversations with any of the defendants in that connection?

A. Yes, from time to time all during the audit and investigation.

Q. Can you state approximately how many times you spoke to one or more of the defendants in that respect?

A. Not specifically. The investigation was—

Q. I don't believe you heard my question. I asked you how many times. A. How many times?

Q. Yes, how many times you spoke to one or more of the defendants in that respect. [259]

A. All during the investigation?

Q. Yes.

A. Well, I was going to explain that the investigation went on for probably two months and I had occasion to speak to them several times a day. The other times, well, there might be several days then that I didn't speak to any of them but I just worked on the books or made outside investigations.

Q. These books that you speak of, where were you working on those books?

A. At their place of business.

Q. At the Vernon Hotel and Restaurant Supply Company?

A. Yes. To be technical it wasn't in their office. It was in Mr. King's office in that building. He let us use the office as they were cramped for space.

Q. And the books you examined were the books of the Vernon Hotel and Restaurant Supply Company?

A. Yes, they were.

(Testimony of James Bryant Eustice)

Q. Now, did you at any time during these investigations have any discussion with any of the defendants here concerning the source of income of the Vernon Hotel and Restaurant Supply Company during 1942, 1943 and 1944?

Mr. McLaughlin: That calls for a yes or no answer, Mr. Eustice.

The Witness: Yes, I did. [260]

Q. By Mr. Strong: And did you in the course of your investigation first investigate one or two or did you investigate them all? Were you investigating them all at once simultaneously?

A. Well, some features of it would be investigated all at once, but then there was an attempt to—

Mr. McLaughlin: Just a minute. I submit that the question has been asked and answered. He said "certain features" and I submit it is immaterial anyway whether he investigated them all at once or separately.

Q. By Mr. Strong: These conversations which you have referred to which you have had with these defendants concerning the income of the Vernon Hotel and Restaurant Supply Company, did they or any of them at any time tell you what the source of their income was?

Mr. McLaughlin: That is objected to as being leading, suggestive and hearsay—not hearsay, but leading and suggestive and immaterial.

The Court: What is leading and suggestive to just ask them if they did a certain thing when he could not possibly put in the mouth of the witness the answer he expects? How could he ask that question, counsel? I will overrule that. Proceed.

(Testimony of James Bryant Eustice)

The Witness: Yes. There was considerable additional income over what was reported on the original returns and in [261] answer to the question as to the source of that income which of course was necessary to ask, well—

Mr. McLaughlin: Just a moment. Your Honor, he is not stating a conversation now. He is stating something else.

The Court: Listen to the question and then answer it.

Q. By Mr. Strong: Can you fix the date as closely as you can of the first conversation that you had with any one of the defendants during your investigation which you received information from any of the defendants as to the source of their income of the Vernon Hotel and Restaurant Supply Company?

A. The approximate date, I can. It would be within the first day or two of the audit. It would be necessary.

Q. And who did you speak to?

A. Most of my conversations were with William Shubin.

Q. The defendant in this case? A. Yes, sir.

Q. And on this first conversation, will you state where it took place?

A. In the office where I was working.

Q. Who was present?

A. Well, the first time we had any conversations I believe to the best of my knowledge William Shubin and Frederick Shubin and probably Jack Kissel was there. We had so many conversations that— [262]

(Testimony of James Bryant Eustice)

Q. Mr. Eustice, would you mind my asking you again to speak up loud enough if you can. We can't hear you. I can't hear you back here.

A. Yes, I will.

Q. Do you recall what *yo* said and what answer you received from the defendant William Shubin on those occasions which you have described concerning the source of income of the Vernon Hotel and Restaurant Supply Company?

Mr. McLaughlin: Your Honor, before I make an objection I would like to ask permission of the court to ask Mr. Eustice a few questions on voir dire.

The Court: Proceed.

By Mr. McLaughlin:

Q. Mr. Eustice, in connection with the discussion that you have just stated you had, your purpose in having that discussion was to obtain information as supplementary to the returns of the Shubins. Is that right?

A. Yes, sir.

Q. And to incorporate that information in documents and records and file it with the Internal Revenue Department in connection with the Shubin returns?

A. Yes, sir. I would make a report.

Mr. McLaughlin: Your Honor, I submit that the question is an improper question and that it is an attempt to circumvent the rule which we have just been arguing here today, in [263] other words to put in evidence information which the government has obtained orally under their duties in obtaining information with respect to returns.

Mr. Strong: If your Honor please, there were being investigated the income tax returns of the Vernon Hotel

(Testimony of James Bryant Eustice)

and Restaurant Supply Company, the entity, the partnership, and also of the individual partners. The witness is being asked concerning the returns and his investigations relative to the Vernon Hotel and Restaurant Supply Company.

Now, it is probable that during the conversations and the investigations which were being carried on concerning the Vernon Hotel and Restaurant Supply Company which I may say parenthetically is the entity or the person whose books were being investigated because they were the books of the Vernon Hotel and Restaurant Supply Company, during this witness' investigation of those books and in the course of that concern as he was working on the books, he had conversations with the defendants which revealed the source of income and other matters concerning the Vernon Hotel and Restaurant Supply Company.

Now, of course I think it is obvious that those conversations must have had some connection with the charges in this case. Otherwise I would not be taking this time to bring them out, but the mere fact that the witness under the ruling of your Honor, based upon the authority in that letter, [264] cannot testify concerning matters which he obtained in questioning the defendants concerning their own income tax returns, I don't think in any way should preclude the witness' bringing out any information which he obtained in investigating the returns of the Vernon Hotel and Restaurant Supply Company.

The Court: I have held that. That was the specific request that you had authority for. That is perfectly all right.

(Testimony of James Bryant Eustice)

Mr. McLaughlin: That is as to Vernon Hotel and Restaurant Supply Company.

The Court: Yes, that is right.

Mr. McLaughlin: Your Honor, could I ask two more questions in view of that?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Eustice, were you questioning the Shubins and Mr. Kissel with respect to their personal income tax returns?

A. Well, the first thing I had to establish was the income of the partnership.

Q. Now, a partnership does not file a return that breaks down where they get their money, does it?

The Court: Well, it might or might not, counsel. We are all familiar with those returns. I am sure when you file your return you get your source mostly from the legal profession. [265]

Mr. McLaughlin: Your Honor, I am not an income tax lawyer either but I do know this and I think Mr. Eustice can describe it, that if individual partners file their own return and the partnership files a report so to speak, that such returns have been filed, and I would like to ask this witness to enlighten the court and the jury on the distinction between an individual return and a partnership return as it is referred to as to the distinction as to what they set forth generally.

The Court: All right.

The Witness: Well, the individuals only pick up their distributive share of the net income as shown on the partnership return. The amount of that income has

(Testimony of James Bryant Eustice)

to be ascertained from books and records of the partnership, and the partnership return should reflect the proper income of the operations of the partnership and the type of operations of that partnership.

Q. By Mr. McLaughlin: What is the form number of the partnership return? A. 1065.

Q. Now one of the purposes of your questions to the Shubins was to verify the amount shown on the partnership return as gross income or gross receipt. Is that right? A. That is correct.

Q. And another purpose of your questioning the defend- [266] ants was to ascertain their individual incomes?

A. Well, after it had been determined on the books of the partnership it was just a matter of making a distribution of that income.

Mr. McLaughlin: That is all I have, your Honor.

The Court: Proceed, counsel.

Q. By Mr. Strong: Then as I understand it, almost your entire audit and investigation related to the partnership, is that right? A. That is correct.

Q. And the income which you were questioning or auditing or investigating was the income of the partnership. Is that right?

A. Well, that was the large part of the income, from the partnership.

Q. Yes.

A. The other returns were also investigated for anything that might be on those individual returns.

Q. The books which you examined, whose books were they? A. The books of the partnership.

(Testimony of James Bryant Eustice)

Q. Did you ever examine any books of the individual defendants in connection with your investigation?

A. No, sir.

Q. Were any such books offered or shown to you?
[267] A. They were not.

Q. So that the only books you examined at any time there were the partnership books?

A. The books of the partnership.

Q. And all your questions which you asked related to the reports on the books of the partnership?

A. Substantially all.

Q. And this conversation which I asked you about, the first conversation which you had which you gave the approximate date of as being a few days after you started the investigation, that conversation was with William Shubin?

A. Well, if you don't mind, I would rather clarify how these conversations would come about.

The Court: All right.

The Witness: During the course of an audit, well, we would run into certain items that we would want clarified, and then I would ask the questions about those whenever the partners were available, when they came into the office or maybe we would request them to come into the office and give that information, and it would almost always be on specific items in connection with the audit.

Q. By Mr. Strong: The audit of the books of the Vernon Hotel and Restaurant Supply Company?

A. Of the partnership, yes.

Q. Of the partnership. Now, going back to this first [268] conversation which you said you had a few

(Testimony of James Bryant Eustice)

days after you started with William Shubin, was that the first person you talked to?

A. Well, in answering that I meant it to be a general statement that our first conversations took place probably about two to three days after the audit. That is, I would have questions to ask regarding the income on the returns.

Q. What I am trying to get as closely as I can is the name of the defendant with whom you had the first conversation, if you recall.

A. Well, William Shubin, I believe, was the first one at that time.

Q. That is the best recollection you have?

A. Yes, sir.

Q. And do you remember as part of your conversation asking William Shubin about the cash which they had during 1943 in the partnership?

Mr. McLaughlin: I assume that is to be a yes or no answer.

The Witness: Would you mind stating the question again?

Q. By Mr. Strong: Yes. Did you discuss with Mr. Shubin the question of how much cash they had available during 1943 in the operation of the partnership?

A. Yes. I had some conversations.

Q. And did Mr. Shubin give you an answer to your [269] questions in that respect?

A. Well, during the year 1940—

Mr. McLaughlin: Pardon me, but you should answer that yes or no if you can instead of stating what he said.

The Witness: Could I have the question again, please?
(Question read.)

(Testimony of James Bryant Eustice)

The Witness: Yes, he did. [270]

Q. By Mr. Strong: Did Mr. Shubin during that conversation indicate to you the source of the money which was being put into the Vernon Hotel and Restaurant Supply Company operations during 1943?

Mr. McLaughlin: That is a yes or a no, also.

A. Yes.

Q. By Mr. Strong: And will you tell us what Mr. William Shubin stated to you?

Mr. McLaughlin: Now, your Honor, we wish to object on the ground that it is not the—I will withdraw that ground—on the ground that it is immaterial and it is not tied down. There is no question that it is tied down to any particular item on this partnership return. In other words, if there is a number so and so on the partnership return that relates to the available cash that was used as capital, then I submit that possibly the question might be proper. But this is an indirect method of getting into evidence all the Internal Revenue Department obtained regarding the present Shubin operations.

The Court: Suppose he did not ask him about individual items. You are assuming that he did. This question is proper, if he told him anything about the source of his income. Proceed.

Mr Strong: Would you speak up in your answers, again, Mr. Eustice. [271]

A. All right. That is regarding the—I understand the question to be regarding the actual cash that came into the business during 1943.

Q. That is right.

A. Well, there was cash from two sources; it was from the payment of regular bills that had been sent

(Testimony of James Bryant Eustice)

out by the company, that is payment for merchandise billed at OPA ceiling prices.

The Court: That is what he told you? That is what he told you?

The Witness: That is what he told us in regard—

The Court: To the income?

The Witness: As shown up on the records.

The Court: All right.

The Witness: That is regarding a specific account.

The Court: All right.

A. And the other was cash that was from overcharges, that is charges made over the ceiling price that was paid mostly in cash.

Q. By Mr. Strong: And did he state to you at that time what had been done with this over-ceiling cash when it had been received in the first instances?

Mr. McLaughlin: The same objection I made to the last question; and I want to add to it the fact that there is no particular item of a book that is before this witness that [272] he is identifying, and all secondary evidence for that reason; and further, that the question is leading.

The Court: Overruled. Proceed. Repeat the question.

(Question read by the reporter.)

A. Well, when I was asking the defendants about cash—

The Court: Which one?

The Witness: William Shubin.

The Court: All right.

A. It was regarding specific items there.

Mr. McLaughlin: May I interpose an objection, your Honor?

(Testimony of James Bryant Eustice)

The Court: Yes. Specific items, now mention the items that you asked him about.

The Witness: Well, for instance, we would be making an analysis of an account like—I believe it is described as “additions and withdrawals to capital” and as to what that account was made up of; and that account was made up of both cash, then, that came in payment of regular—

Mr. McLaughlin: Wait. Is this witness testifying as to what Mr. Shubin said, or is he describing an account as to its contents? If he is attempting to do that, it is not the best evidence.

The Court: Well, you have not let him answer. Are you testifying to what Mr. Shubin told you?

The Witness: Yes. [273]

The Court: Yes. All right; proceed.

A. That is in answer to what the cash was that went into that account. Well, it was cash from two sources there and it was shown up on the books. There was so much cash received for the day; part of that cash was in payment of accounts receivable, which were credited to “accounts receivable”; part of it were cash sales which were credited to “cash sales”; part of it was from cash from overcharges that was credited to “advances and withdrawals.” That was the amount that would be picked up as additional income.

The Court: That is what he told you? That is what he told you?

The Witness: That is what he told us the account was made up of; yes.

The Court: All right; proceed.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: And did he at any time during that conversation disclose to you what they did with this cash which they received, where they kept it?

Mr. McLaughlin: Objected to as immaterial where they kept it and also as leading and suggestive.

The Court: It might go to the question of intent, counsel. Overruled.

A. It went into the regular business bank account.

The Court: What did?

The Witness: The money, cash. [274]

Q. By Mr. Strong: You mean the overcharges?

A. Yes.

The Court: What did he do with the other money; where did that go, the regular charges?

The Witness: It was all deposited at the same time.

The Court: Very well; proceed.

Q. By Mr. Strong: Did you have any conversations of this type with any of the other defendants during your investigation?

A. Well, there was conversations with all three of the defendants; there would have to be during the investigation, although most of the time the answers came from William Shubin; that is, the other defendants for the most part would not give a decisive answer on the operations of the business.

Q. But, were the other defendants present during these conversations?

A. At times, sometimes, yes; and sometimes, no. Sometimes I had conversation with the other partners and William Shubin was not there, either, but most of the information finally came from William Shubin.

(Testimony of James Bryant Eustice)

Mr. Strong: Your Honor, this witness is going to be on the stand for quite some time. I realize it is not quite five o'clock yet, but I was wondering if I could ask your Honor's indulgence to have an adjournment at this time so that I can re-arrange some phases of this questioning and [275] take less time later on? I had expected to put in other evidence at this time but I have not been able to in view of your Honor's ruling, and I think that a lot of time will be saved subsequently if I can organize this witness' questioning a little better. We had not anticipated using him so soon and I was going to use him tonight, myself.

The Court: Most of our courts here adjourn at 4:30. I have such a crowded calendar is the reason I have had to hold longer sessions.

(Whereupon, the court admonished the jury and an adjournment was taken until 10:00 o'clock a. m. of the following day, Thursday, June 20, 1946.) [276]

Los Angeles, California, Thursday, June 20, 1946,
10:00 A. M.

The Court: Mr. Cross, call the calendar.

The Clerk: Yes, your Honor. No. 18367 Criminal, United States vs. William A. Shubin, Frederick Alexander Shubin and Jack L. Kissel for further jury trial as to all three defendants.

Mr. Strong: The government is ready.

Mr. McLaughlin: The defendants are ready and are all in court.

The Court: Stipulate that the defendants are in court?

Mr. McLaughlin: So stipulated.

(Testimony of James Bryant Eustice)

Mr. Strong: So stipulated.

The Court: Stipulate that the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

Mr. Strong: Mr. Eustice.

JAMES BRYANT EUSTICE,

the witness on the stand at the time of adjournment, being previously duly sworn, was examined and testified further as follows:

Direct Examination (Cont'd)

By Mr. Strong:

Q. You are the same Mr. Eustice who testified here [279] yesterday? A. Yes, sir.

Mr. McLaughlin: Mr. Strong, could I interrupt you just a moment?

If your Honor please, at this time and in the possible interest of saving time in this case I have a motion which I desire to make which is directed at the indictment in this case and proceedings before the grand jury, and I believe that the motion is well taken and if it is granted would end the case.

Now, I appreciate the fact that we are just starting here with a witness and I feel it would probably take a half hour to argue that motion. If your Honor wishes to hear it now or wait until later in the day it is agreeable with me. The only thing is that if it is good there is no need to proceed further with the witness.

(Testimony of James Bryant Eustice)

The Court: Well, I will hear it later. Proceed. [280]

Mr. Strong: Your Honor said you would hear it later?

The Court: Yes.

Q. By Mr. Strong: Now you were testifying yesterday concerning your investigation into the income of the Vernon Hotel & Restaurant Supply Company and concerning your discussions respecting that income with the various defendants in this case, as you recall. Now, about how long a time did you spend on the premises of the Vernon Hotel & Restaurant Supply Company in connection with this investigation of its income?

A. Well, the period of time covered a period of about two and one-half months.

Q. And how often were you there during that period?

A. On the premises?

Q. Yes.

A. Oh, I would say more than 50 per cent of the time.

Q. In conducting your investigation of that income whom did you question as to the income and its sources and various other facts which you were inquiring about?

A. Well, I had occasion to question any of the partners that would be there and available at the time.

Q. You mean the defendants in this case?

A. Yes.

Q. And did you always question one or more of the partners, the defendants? [281]

A. I don't understand that there is a difference between the question and the other question I just answered.

(Testimony of James Bryant Eustice)

Q. I was wondering whether you always directed your questions to them, or whether there were any other persons there whom you questioned in that respect?

A. At their office?

Q. Yes. A. No; not that I recall.

Q. Now, I don't understand your answer. Do you mean you do not recall questioning anybody else, or do you mean you do not recall what happened?

A. I do not recall anybody else being present in the office at the time.

Q. I see. So that all your questioning was of the three defendants? A. Yes, sir.

Q. And, as I understand your testimony, examination was into the source of the income of the partnership?

A. Yes; it was.

Q. As I understand, what you were concerned about primarily was the difference in the income reported on the amended income tax returns which are here in evidence of the Vernon Hotel & Restaurant Supply Company—the difference between the sums on the amended returns and the sums which had originally been reported, is that right? [282]

A. No; not exactly. My function was to determine the correct income of the partnership, irrespective of what was on the amended returns.

Q. I see. Did you discover that there was income which the partnership had derived during the years 1942, 1943, and 1944, which was not on the original income tax returns?

Mr. McLaughlin: If your Honor please, that is calling for a conclusion and it is not the best evidence and it is immaterial.

(Testimony of James Bryant Eustice)

The Court: Repeat the question, please.

(Question read by the reporter.)

The Court: Overruled.

A. Yes; I did.

Q. By Mr. Strong: And how much was the sum for the three years which was not reported on the original income tax returns?

Mr. McLaughlin: Again, your Honor, we object on the ground that it is immaterial, calling for a conclusion, and is not the best evidence.

The Court: Overruled.

Mr. McLaughlin: May the record show that the witness is looking at some notes now and apparently is refreshing his recollection?

The Court: Yes.

Mr. McLaughlin: And before he answers, your Honor, I [283] think that there should be some foundation laid as to what he is looking at, if he is going to testify from some notes.

The Court: That is correct.

Q. By Mr. Strong: Have you at present no exact recollection of the amount that I asked for?

A. I can tell you, yes, approximately within probably two or three thousand dollars.

Q. Without refreshing your recollection?

A. Yes, sir.

Q. Would you do so, please?

Mr. McLaughlin: The same objection that I made to the previous question, immaterial and not the best evidence.

(Testimony of James Bryant Eustice)

The Court: He may answer.

A. About \$144,000. [284]

Q. This sum of \$144,000, did you discuss that sum with the three partners, the three defendants in this case, or any one of them?

A. Not that particular sum, but the items that made up that sum.

Q. In other words, you took separate items which you questioned them about? A. That is correct.

Q. Which ultimately totaled the sum that you just gave us? A. Yes, sir.

Q. Which of the three defendants did you talk to about that money?

A. Well, during the examination I had as I have mentioned occasion to talk to all of them. Most of the conversation was with William Shubin.

Q. But you did talk to all three of them?

Mr. McLaughlin: Your Honor, that question has been asked. It was asked yesterday.

The Court: Yes, and asked again today and it has been asked twice now. Proceed, counsel.

Q. By Mr. Strong: Did the defendants state to you the source of this \$144,000 of partnership income?

Mr. McLaughlin: That is objected to on the ground that it is calling for a conclusion and does not state the times, [285] places, parties present or who said it, and further that it is immaterial.

The Court: The first part of the objection, of course, is frivolous. The rest of the objection is good. Lay a better foundation.

(Testimony of James Bryant Eustice)

By Mr. Strong:

Q. Did you discuss with the partners these various items that you mentioned as making up the total amount ultimately on any one occasion or on different occasions?

A. On different occasions.

Q. And did you discuss separate items on separate occasions?

Mr. McLaughlin: That is objected to as having been asked and answered.

The Court: He said he had. Counsel, he has answered these questions. He said he had discussed it with all the defendants several times.

Mr. Strong: All right, your Honor.

Q. Will you state, giving the date if you can as closely as you can, and stating the place where the discussion took place and giving the names of the persons present and stating who it was of the defendants with whom you discussed the matter——

The Court: And what they said.

Q. By Mr. Strong: And what they said beginning with [286] the first time and going through each of the incidents.

Mr. McLaughlin: Now, your Honor, I just want to make an objection in view of the fact that he has also asked for the conversation. I want to object on the ground that it is immaterial and is not the best evidence.

The Court: What would be better evidence than their oral statements?

Mr. McLaughlin: Your Honor, I am going to submit to your Honor's ruling on it. I don't care to argue it.

The Court: No. I want to know. I want to be advised. If there is better evidence than the oral statement

(Testimony of James Bryant Eustice)

I want to know what it is. You say it is not the best evidence. Now, if there is better evidence than an oral statement I want to know what you have in mind.

Mr. McLaughlin: I can't tell yet what is going to be said, your Honor. I don't know whether they are going to talk about the contents of books or what.

The Court: Well, so far he has just asked him what was said. He hasn't asked about books or records. All right, proceed.

Q. By Mr. Strong: Would you go ahead, please?

A. Well, in order to determine the——

The Court: No. The first question is fix the time as near as you can.

The Witness: Well, the first conversation we had was [285] probably two or three days after the audit began.

The Court: Now when did the audit begin?

The Witness: August 11, 1945.

The Court: All right. Now, where was this conversation?

The Witness: In the same building that the partners had their place of business; that is the Vernon Hotel and Restaurant Supply Company.

The Court: Now, who was present?

The Witness: William Shubin, Frederick Shubin and possibly Jack Kissel.

The Court: You are not sure about Jack Kissel?

The Witness: No.

The Court: All right, go ahead. What was said?

The Witness: Now, that is hard on this to—that is bringing out one particular conversation as the particular date. During the course of the audit questions were being

(Testimony of James Bryant Eustice)

asked continuously as the items came up. It is hard to explain and it is easier to say that the conversations were had with William Shubin or various other members of the partnership at different times during the audit and what they said during those conversations.

The Court: Well, the question is to the best of your recollection what was the conversation at the first conference when you discussed these matters.

The Witness: Well, our first discussion I believe was on [288] the method of handling the overcharges that were made on the sale of meat.

Mr. McLaughlin: Your Honor, I move to strike that statement.

The Court: It may go out. That is a conclusion of yours. You must state as near as you can what you said and what they said, if you had any conversation, and who spoke.

The Witness: Well, I questioned the partners regarding this account called Additions and Withdrawals to Capital, as to what that account was made up of.

The Court: Now, who did you address that question to?

The Witness: William Shubin was one.

The Court: What did William Shubin reply?

The Witness: That that account had been used for recording cash that was received from overcharges.

The Court: Was anything else said in that conversation?

The Witness: Well, he was questioned as to the manner in which that cash was accumulated or put into that account. The answer was that as the cash was accumulated it was accumulated and was kept some place at the

(Testimony of James Bryant Eustice)

taxpayer's residence and from time to time as they needed the money in the business for the business operations it was deposited to their business bank account and the credit was to this account, additions and withdrawals from capital.

From time to time they withdrew money from the business [289] and charged it against this account. That money that was withdrawn was deposited, some of it, to their personal bank accounts. Sometimes it would be put back into the business in this same account.

The Court: Proceed, Mr. Strong.

Q. By Mr. Strong: Did William Shubin during that conversation disclose to you the source of this money?

Mr. McLaughlin: That is objected to as leading and suggestive and immaterial.

The Court: Leading and suggestive? I don't know how you can ask it any other way. Immaterial of course is always a proper objection if counsel feels it is. Overruled and exception allowed.

The Witness: Well, the source was from cash receipts from overcharges.

The Court: That is what he said, was it?

The Witness: Yes, sir.

Q. By Mr. Strong: Did he say what overcharges?

Mr. McLaughlin: The same objection, your Honor.

The Court: All right. Overruled.

The Witness: Yes, from the sale of meat.

Q. By Mr. Strong: Now, do you recall the second time that you had any conversation with any one of the defendants concerning the source of income or the income of the Vernon Hotel and Restaurant Supply Company? [290]

(Testimony of James Bryant Eustice)

A. Well, I had another discussion of another account used for a similar purpose during the year 1944. That is, this account was used during the year 1944. [191]

Q. When did the discussion take place and where and who was present and what was said by you and the person whom you were addressing?

A. Well, this account was——

Mr. McLaughlin: Just a minute. Did he say he was addressing William Shubin on this occasion?

The Court: He has not stated yet.

Mr. McLaughlin: Well, I object on the ground there is not a proper foundation.

The Court: Lay a further foundation.

Q. By Mr. Strong: Would you please answer my question as to when, where, and with whom you spoke on that occasion, first, before you go into the conversation itself?

A. Well, the exact time—I can only approximate.

The Court: That is all you have to do.

A. It was during the first part of the examination.

Q. By Mr. Strong: Can you give the month and the year?

A. Well, the month would be August.

The Court: What year?

The Witness: 1945.

Q. By Mr. Strong: And where was it?

A. In the building where the Vernon Hotel & Restaurant Supply Company had their place of business.

Q. And who was present? [292]

A. Both William and Fred Shubin, and at the time that this account that I was going to discuss—there was naturally several discussions on it.

(Testimony of James Bryant Eustice)

Q. Well, taking just this one that you are referring to, taking the first discussion, will you state what you said to either William or Fred Shubin and what they said to you?

A. Well, my discussion on that account would be questioning regarding items in that account as they came up during the examination, as to what the account was used for, and any particular items that were in that account.

Q. And were you still investigating into the source of the income of the Vernon Hotel & Restaurant Supply Company?

A. Yes, sir.

Q. And were your questions on this occasion directed toward that end?

A. Yes, sir.

Mr. McLaughlin: Your Honor, that question has been asked and answered.

The Court: Yes.

Mr. McLaughlin: There is no question but what they were investigating it.

The Court: It has been asked and answered, Mr. Strong.

Mr. Strong: I want to be sure, your Honor, in each instance, that he is talking about the Vernon Hotel & Restaurant Supply Company account, rather than the individual [293] in view of your Honor's ruling.

The Court: I think that is correct. It must be shown that the conversation is directed to a particular subject. All right.

A. As far as persons present, I have omitted, probably, in the other conversations to state that at all times or substantially at all times Special Agent Samuel J. Phoebus was present during these conversations.

(Testimony of James Bryant Eustice)

Q. Now, going into the conversation on this occasion which you have just told us about, will you state what the conversation was, what you asked and what was answered to you?

A. Well, the discussion on that was had with all three was deposited to this account.

Q. And what were you told and by whom?

A. And I was told that the money that went into this was from overcharges made from the sale of meat.

Q. Who told you that?

A. Well, I asked as to the source of the money that partners there.

Q. On this occasion?

Mr. McLaughlin: Your Honor, I move to strike the last two answers unless the witness can testify who told him that.

The Court: Well, if they were all three present there, I do not believe, counsel, that on the first count of the [294] indictment it is necessary to identify the particular individuals. It goes to the weight of the testimony, because, under the first count, they would all be bound.

Mr. McLaughlin: Your Honor, just may I make this further observation?

The Court: Yes.

Mr. McLaughlin: If he cannot do it, if he cannot recall, I think the record should show whether he can recall who said it.

The Court: Oh, yes; that is right.

Q. By Mr. Strong: If you can remember who said it, please state his name; if you can't, state that you do not remember.

(Testimony of James Bryant Eustice)

A. Well, as I have mentioned before, definitely, that all my conclusions were, I believe, or substantially all of them regarding the business, were discussed with William Shubin. My discussion with other partners—well, I was usually referred back to William Shubin for the answer; that they did not ordinarily take the responsibility of giving me the answer to any of these problems.

Q. And on this occasion which you have just discussed, do you recall who it was that gave you the answer which you have stated?

A. Well, I got the answer from William Shubin, as on most other phases. [295]

Q. And that was in the presence of what other partners, if any?

A. Well, I recall that this account was discussed during the presence of Fred Shubin. I wouldn't say definitely whether Jack Shubin was in the office at that particular time—or, I mean Jack Kissel.

The Court: In this conversation did you have any specific item or amount that you had before you?

The Witness: Yes; we had this particular account that we were making an analysis of, the exchange account here.

The Court: All right.

The Witness: I can——

Q. By Mr. Strong: And was he—I am sorry.

The Witness: ——from my work papers I can tell you the figures of additional income that were determined in that particular account.

Q. You mean you can't recall without refreshing your recollection from the work papers?

A. Well, I can recall approximately.

(Testimony of James Bryant Eustice) .

Q. If you can recall without refreshing your recollection, will you state the approximate amount which you were questioning?

Mr. McLaughlin: To which we object as immaterial.

The Court: Overruled. The question is: Was there some sum of money that you were asking the defendants about? [296] That is very clear. Do you remember approximately the amount?

The Witness: Yes; I can say almost definitely it was \$46,000.

The Court: All right.

Q. By Mr. Strong: And was that the amount concerning which you got the answer from William Shubin that you testified to before?

A. That is correct.

Q. Now, do you remember the next occasion when you had a conversation with any of the three defendants here concerning the income of the Vernon Hotel & Restaurant Supply Company and the source of that income?

A. As to dates, no. As to specific items—well, they were questioned regarding other expenditures of this money that was received. In other words, it was not necessarily that all of this cash would be deposited into the business; it might have been used for personal expenses or for other business investments outside of the business.

Q. Let me ask you as to specific items and possibly that will assist you in fixing the date, the place and the time. Did you ever have a conversation with the defendant Jack Kissel concerning his personal bank account at the Citizens National Bank and respecting a deposit for \$500.00 which was made to that account on or about November 18, 1943? [297] A. Yes.

(Testimony of James Bryant Eustice)

The Court: Just yes or no. A. Yes, sir.

Q. By Mr. Strong: And was that questioning in connection with your investigation into the income and the source of the income of the Vernon Hotel & Restaurant Supply Company? A. It was.

Q. And do you recall when this conversation with Jack Kissel took place—approximately, if you do not remember the exact date?

A. Yes. About, probably, during the middle of the audit after we had had time to make a transcript and analyze the——

Q. Can you fix a date by month and day, if you can, and year? A. No; I couldn't.

Q. Rather than the middle of the audit.

A. Well, I would say sometime in September.

Q. Of what year? A. 1945.

Q. And where were you discussing this?

A. In the office where we were making the audit.

Q. And who was present?

A. Well, Jack Kissel was present and Special Agent [298] Phoebus.

Q. And what did you say to Mr. Kissel and what did he answer to you?

Mr. McLaughlin: Now, your Honor, before that question is ruled on, may I ask the witness a question on voir dire?

The court: Yes.

Q. By Mr. McLaughlin: Mr. Eustice, when you were having this conversation with Mr. Kissel you were also eliciting information for use in preparing a matter in connection with Jack Kissel's personal income tax return, were you not?

(Testimony of James Bryant Eustice)

A. Not at that time, except as it would be transferred from the income that was determined for the partnership. At this time I was determining the income of the partnership, the Vernon Hotel & Restaurant Supply Company.

Q. But the information you were obtaining was also to be used in connection with Jack Kissel's personal returns?

A. The income of the partnership would be used on his personal return.

Q. And the information you were seeking could be used also?

A. I don't understand your last question.

Q. Well, Mr. Eustice, the information that you were seeking to elicit was to determine whether Jack Kissel owed the Government any income tax or penalties, as well as the [299] Vernon Hotel & Restaurant Supply Company, Wasn't that right?

A. That came within the scope of the audit; yes.

Mr. McLaughlin: Your Honor, I make the objection on the ground that it is privileged and it is a circumvention of the statute and the regulation which we had to deal with yesterday.

The Court: We are not going into his personal income. The fact that it happens to be in these books, that is no reason to exclude it. In other words, if he looks into an account and sees a withdrawal of \$5,000, we are not going into whether that was a proper withdrawal or not. We are not going into that, as I ruled yesterday. But you cannot deny the admissibility of this testimony, when it is found in a partnership account and the partnership is being reviewed and its figures being reviewed. Objection overruled, exception allowed. Proceed.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: Will you now state what you said to Mr. Kissel on the occasion which you have just described and what Mr. Kissel said to you? And please speak up.

A. Well, I asked him if that was income from—or, I mean, if the monies that he deposited were received from overcharges or any other source of income. He stated that it was part of the overcharges.

Q. Did he tell you what overcharges?

A. He didn't need to tell me. [300]

The Court: No, no, no. Now, just what he said, you know, if he said anything; just what the discussion was.

A. I don't recall that he named that specifically.

Q. By Mr. Strong: Now, again, I do not want to keep repeating, but I am asking you simply concerning your investigation into the income of the Vernon Hotel & Restaurant Supply Company and into the source of that income. All my questions are directed only toward that.

A. I understand.

Q. And please bear that in mind. In that connection and in connection with that investigation did you ever have occasion to speak to the defendant William A Shubin concerning his purchase of a trust deed in October, 1943, and certain clothes during that year?

A. Yes; I had. [301]

Q. Will you state approximately when that conversation took place, where it took place, and who was present?

A. I would say it took place the latter part of September with William Shubin present.

Q. What year? A. 1945.

Q. And where was it?

A. And Samuel J. Phoebus, special agent, present in the office where I was making the audit.

(Testimony of James Bryant Eustice)

Q. And will you state what was said to Mr. William Shubin and what he said to you in that connection?

Mr. McLaughlin: Your Honor, I would like to have an objection noted on the ground of immateriality and on the ground that it is without the scope of the issues in the case.

The Court: Overruled. Proceed.

The Witness: Well, I asked Mr. Shubin if that was where he obtained the money where it was invested in this property and he stated it was part of the money received from overcharges he had made on the sale of meat.

Q. By Mr. Strong: Sales of meat as an individual?

The Court: Just what he said, that is all we want and the court and the jury will draw conclusions. You say he said these were from overcharges for meat. Was anything else said? [302]

The Witness: No.

The Court: All right. Proceed.

Q. By Mr. Strong: Did you speak to him about the purchase of some clothes during 1943?

Mr. McLaughlin: That is objected to—well——

The Court: Just yes or no to that question. Do you remember at any time mentioning the purchase of clothes?

Mr. Strong: On this occasion is what I am referring to.

The Court: All right.

The Witness: I don't know whether I can give you a yes or no answer on that.

The Court: Well, go to the next question then.

Q. By Mr. Strong: How much money was the sum that Mr. Shubin told you he had obtained from the over-

(Testimony of James Bryant Eustice)

charges on meat in connection with the trust deed that you have just discussed?

Mr. McLaughlin: Objected to as leading.

The Court: Yes. That question is not proper. Repeat the question, Miss Bennallack.

(Question read.)

Mr. Strong: I will reframe it.

The Court: Very well.

Q. By Mr. Strong: Did Mr. Shubin on the occasion of the discussion which you have just described state to you how much money if any was invested by him in this trust deed? [303]

Mr. McLaughlin: Objected to on the ground that it is immaterial.

The Court: Overruled.

The Witness: I already knew the amount and I would be asking him where he received it.

Mr. McLaughlin: That should be a yes or no answer, Mr. Eustice; did he or didn't he.

The Court: Was the amount stated by either you or by him in that conversation?

The Witness: It was stated by me.

The Court: To him?

The Witness: Yes, sir.

The Court: All right, go ahead.

Q. By Mr. Strong: What was the amount?

A. I don't recall without referring to my notes.

The Court: All right, refer to your notes if you don't recall without them; and lay a better foundation before the notes can be used.

(Testimony of James Bryant Eustice)

Q. By Mr. Strong: Are these notes made by you, these notes that you are referring to?

A. Yes, sir.

Q. Will you state what they are and when you made them?

A. The ones I am referring to now are papers that I made during the course of the audit.

Q. And the material contained on those notes was ob- [304] tained by you from what source?

A. Some of it from the books and records of the Vernon Hotel and Restaurant Supply Company and some from outside sources from where the partners did business, at their banks, or any other place where we may have had occasion to investigate their income.

Q. Did you obtain any of that information from the defendants that is on your notes?

A. Yes, some of it.

Q. And at the time you made these notes which you are looking at now was the information contained on the notes then fresh in your memory?

Mr. McLaughlin: Just a moment. Your Honor, I think we are taking up a lot of time on this and I don't think it is proper to use the notes, but I have no disposition to circumvent counsel getting in the amount of that trust deed, subject to my objection that it is immaterial, and if he knows what it is he can state it, subject to my objection.

The Court: Subject to your objection that it is immaterial, what is the amount, Mr. Strong?

Mr. Strong: \$600 is the sum that they were discussing.

Mr. McLaughlin: That was the trust deed that was stated by Mr. Shubin?

(Testimony of James Bryant Eustice)

Mr. Strong: I can't go into details. I can only state what the amount was that was being discussed. It was \$600.00, [305] Mr. Shubin's share of the trust deed.

The Court: Proceed to the next question.

Q. By Mr. Strong: Did you at any time discuss with the defendant Frederick Shubin the question of the source of the funds which he used to purchase the trust deed which we have just discussed?

A. Yes. My memory is that both Fred and William were present at the time that discussion of the trust deed took place.

Q. You mean they were both present on the occasion you have just discussed?

A. The time the trust deed was discussed, yes.

Q. And what did you ask Mr. Frederick Shubin and what did he tell you about those funds?

A. Well, it was the same question there and the trust deed was as I recall now actually \$1200 and why it is divided there is that both William Shubin and Fred Shubin had one-half interest in the trust deed and they were questioned as to the source of the funds that were used as an investment in that trust deed, to which the answer was that it was from money received from overcharges.

Q. Is that the answer of both or just one?

A. Of both.

Q. Did you at any time in connection with your investigation as to the source of the receipts of the Vernon Hotel [306] and Restaurant Supply Company question the defendant Jack Kissel concerning the purchase of a 1942 Pontiac?

The Court: Just answer the question yes or no.

(Testimony of James Bryant Eustice)

The Witness: I don't recall any direct conversation on it.

The Court: All right, the next question.

Q. By Mr. Strong: Can you look at your notes and see if they refresh your recollection?

A. No. I can tell you how the items were arrived at——

The Court: No, that is not the question, not how you arrived at it, but whether or not you had any discussion with Jack Kissel with reference to a Pontiac car. Now, was that subject ever discussed with him that you remember?

The Witness: No. I recall that so far as that item was concerned it wasn't necessary to discuss it.

The Court: All right. Proceed to the next question.

Q. By Mr. Strong: Did you at any time discuss with any of the defendants, particularly Jack Kissel, the question of the source of the funds used to purchase a 1938 Chevrolet truck?

A. The same answer applies to that as to the other.

The Court: Next question.

Q. By Mr. Strong: Directing your attention to the sum of \$1,713 and the sum of \$1,200, did you at any time have any discussion with the defendant Jack Kissel as to the source [307] of those two sums, and you can use your notes if you don't remember.

Mr. McLaughlin: I think the witness should first state that he doesn't remember independently.

The Court: Yes, that is right. First, have you any independent recollection of this transaction without referring to your notes that enables you to testify?

(Testimony of James Bryant Eustice)

The Witness: I don't recall what those particular items were applicable to.

The Court: All right.

Mr. Strong: I didn't hear the entire answer. May I have it read, your Honor?

The Court: Yes. Miss Bennallack, read the answer.
(Answer read.)

Q. By Mr. Strong: Did you at any time discuss with the defendant Frederick Shubin—are you looking up your notes?

A. Yes, I was looking up my notes.

Q. By Mr. Strong: I will withdraw the question.

Would you look at your notes and see if they refresh your recollection as to the item I mentioned in the previous question?

A. Those items occurred in 1943 or 1944?

Q. November of 1943. A. No. [308]

Q. Well, I think we will save time by just dropping that. A. I have the item here——

Mr. McLaughlin: Just a moment. The only purpose of looking at the notes is to refresh the memory. Is that correct, your Honor?

The Court: That is right.

Q. By Mr. Strong: Will you state if the notes refresh your memory and then testify from your memory rather than from your notes?

A. Well, the item covers purchase of a Pontiac automobile by Jack Kissel during that period of time.

Q. Did you discuss with Jack Kissel the purchase of that automobile? Just yes or no.

A. I think all these personal items were discussed some time during the audit.

(Testimony of James Bryant Eustice)

Q. Did you ask Mr. Kissel as to the source of this sum? A. Yes, sir.

Q. What did he say to you and what did you say to him or the other way around, what did you say to him and what did he say to you?

A. Well, my question was always as to where the funds came from that were used for these particular items and the answer was that they were part of the cash received from overcharges. [309]

Q. Is that what Mr. Kissel told you on this occasion that you are referring to? A. Yes.

Q. Now, did you at any time discuss with the defendant Frederick Shubin in connection with your investigation of the income of the Vernon Hotel and Restaurant Supply Company, did you discuss with Frederick Shubin at any time the sum of \$1,000 which had been desposited in the Citizens National Bank to the account of Frederick Shubin and J. D. Johnson?

A. Yes, sir.

Q. And when did you have that discussion and where did it take place and who was present?

A. The conversation would have taken place some time in September, probably the first part of September in the office where I was making the audit.

Q. What year? The year is important too.

A. 1945.

Q. And who was present?

A. Frederick Shubin and Special Agent Phoebus.

Q. Do you remember what you said to Frederick Shubin and what he said to you in that connection respecting this item?

(Testimony of James Bryant Eustice)

A. Well, I questioned him respecting the source of the funds from which he made the deposit, to which his answer was that it was part of the cash received from overcharges. [310]

Q. Did he say it in those words?

Mr. McLaughlin: Just a moment. Your Honor, I think it has been asked and answered, but I am the one that——

The Court: I think it has been. Proceed, counsel.

Q. By Mr. Strong: Did you at any time in your investigation of the income of the Vernon Hotel and Restaurant Supply Company discuss with any one or all of the defendants the exchange account of that partnership?

A. Yes, I did.

Q. Can you state approximately when, where and who was present at the conversation?

A. That was just discussed during the early part of the audit. That must have been in August of 1945 at the office where I was making the audit.

Mr. McLaughlin: Wasn't that gone into yesterday afternoon, the exchange account?

The Court: I don't think so. I don't remember.

Mr. Strong: I don't recall that it was.

Mr. McLaughlin: I am not positive, but I think Mr. Strong mentioned that account.

The Court: No, I think not. It has not been mentioned up to date. Proceed.

Q. By Mr. Strong: And was there any particular figure that you were discussing?

A. I believe that was the figure of \$46,000 that I mentioned back a while ago, that is in our earlier session.

(Testimony of James Bryant Eustice)

Q. I don't recall whether you stated who of the defendants was present at that conversation.

A. William Shubin and Frederick Shubin, I believe.

Q. And what did you say to them and what did they say to you, if anything?

Mr. McLaughlin: If your Honor please, he has now tied it down to the \$46,000 which he has already gone into this morning.

The Court: No, he just mentioned it. He never made any other comment except to mention the amount. I asked him if there was some comment and he said that was all. Proceed.

The Witness: Yes. The partners were questioned regarding the source of the funds that were deposited to the credit of the exchange account and they had stated that it was cash received from overcharges which was with the exception of a few—that is, some items that were specifically referred to in that account.

Q. By Mr. Strong: Do you recall the amount of money involved in these items which you say were excepted to?

A. One item was an exchange check of I think——

Q. Just the total sum if you can give it.

A. About \$4,000.

Q. Did you at any time during your investigation into the income and source of income of the Vernon Hotel and [312] Restaurant Supply Company discuss with the defendant William Shubin the sum of approximately \$11,500 in cash? A. Yes.

Q. Can you state about when the discussion was held, where it was held, and who was present?

(Testimony of James Bryant Eustice)

A. Well, I remember that item was particularly discussed during the latter part of the audit which must have been the latter part of September or the first part of October 1945 and at which time, well, William Shubin was being questioned regarding the amount of cash that he had on hand.

The Court: Was anyone else present?

The Witness: Special Agent Phoebus.

The Court: Is that all?

The Witness: That is all I recall.

The Court: All right.

Q. By Mr. Strong: What did you say and what did Mr. Shubin reply?

A. Well, he stated to the best of his recollection that was the amount of cash that he had on hand that was undeposited cash from money received from overcharges.

Q. Did you at any time during your investigation into the source of the funds of the Vernon Hotel and Restaurant Supply Company discuss with the defendant William Shubin the sum of approximately \$5,288 which had been deposited to the personal bank account of William Shubin and Julia T. Shubin? [313]

A. Yes, I did.

Q. Will you give the date, the place, and the persons present?

A. William Shubin was present and Special Agent Phoebus.

Q. The date?

A. It must have been some time in September of 1945.

Q. And the place? A. In the office.

Q. Will you state what was said to William Shubin and what he said to you concerning this item?

(Testimony of James Bryant Eustice)

A. Well, I asked Mr. Shubin as to the source of the funds that were deposited to that account and he stated—I don't recall at the time whether that was all the money that was in that account or not, but that that particular amount was from cash received from overcharges and I believe he also stated at that time that that was part of the cash on hand, but because I don't believe that was the determination I made in my audit because of the fact that——

Q. Just what he said and what you said.

A. Oh, I beg your pardon.

Q. Did you at any time discuss with the defendant William A. Shubin the sum of approximately \$14,254 which had been deposited to the personal bank account of William Shubin? A. Yes, sir. [314]

Q. Will you give us the date, place and the persons present?

A. Well, the date would be probably the same time or approximately the same time as the discussion on the other bank account, some time in September of 1945 in the office where I was making the audit and in the presence of Special Agent Phoebus.

Q. What was said by you and what was said by Mr. Shubin?

A. Well, I questioned Mr. Shubin as to the source of these funds and he stated that that was part of the money that was received from overcharges.

Q. Did you at any time discuss the question of the sum of \$15,314 which had been deposited to the personal bank account of the defendant Frederick Shubin?

A. Yes, sir.

(Testimony of James Bryant Eustice)

Q. Will you give us the date, the place and the persons present?

A. These bank accounts were all discussed around approximately the same time in September of 1945 and in the presence of—that is, with Frederick Shubin in this particular case and in the presence of Special Agent Phoebus.

Q. And what was said by you as to the sum of \$15,314 and what was said by the defendant Frederick Shubin?

Mr. McLaughlin: Your Honor, before that question is [315] answered I would like to ask a question on voir dire.

The Court: Proceed.

Q. By Mr. McLaughlin: Mr. Eustice, on any of the conversations that you had with any of the defendants at this place of business, did you tell them that what they told you might be used against them in any criminal proceedings?

Mr. Strong: I don't think that is material, your Honor.

Mr. McLaughlin: I want the record to show it anyway. [316]

Mr. Strong: I don't think that is material, your Honor.

Mr. McLaughlin: I want the record to show it, anyway.

Mr. Strong: I object to that question, your Honor.

The Court: I will permit the question in order to protect the record. Counsel should be careful and have the record protected. Do you understand the question?

The Witness: Yes, sir. I don't recall at any time.

(Testimony of James Bryant Eustice)

Q. By Mr. McLaughlin: You have no recollection of ever having cautioned them that the things that they told you might be used against them in some proceeding brought by the Government?

A. No; not regarding these particular items. Whenever they came up, I just asked the questions which I was authorized to do.

Q. Yes.

A. In an income tax investigation. I didn't warn them at every time that that might be used in another investigation.

The Court: Now, you qualified that. You say you did not warn them every time. Did you warn them at any time? That is what counsel is interested in. Did you warn them at any time?

The Witness: I didn't warn them at any time.

The Court: All right; proceed.

Mr. McLaughlin: Your Honor, just to go further in the [317] record protecting, I move to strike the testimony that this witness has given as to discussions with the defendants on the ground that they were not cautioned as to what purpose the information they gave would be used, or whether it would be used against them.

Mr. Strong: Your Honor, I might state at this time that I will prove that the defendants were warned, were cautioned and were told that any information they gave during this investigation could be used against them in any subsequent proceeding; that at the time they were cautioned their attorneys were present and they consulted with their attorneys. And I shall also show that the investigation, the portion of the investigation conducted

(Testimony of James Bryant Eustice)

by this particular witness, followed another portion of investigation which preceded this and prior to which the warnings were given as I have stated.

The Court: Overruled, exception allowed the defendants. Proceed.

Mr. McLaughlin: May I have a stipulation that I object to further questioning of this witness on the grounds that I made my motion just a moment ago, so that I won't have to make an objection every time?

The Court: It is so understood, and motion to strike denied. Proceed.

Mr. Strong: Is there an unanswered question, Mr. Reporter? [318]

(Question read by the reporter.)

The Witness: I didn't answer that question?

The Court: No.

A. Well, I questioned in the case of Fred Shubin. That was Fred Shubin?

The Court: Yes.

Mr. Strong: That is right.

A. I questioned Fred Shubin as to the source of the funds he had deposited to his personal bank account, and he had replied that it was part of the cash received from overcharges.

Q. Did you at any time discuss with the defendant Jack Kissel the sum of approximately \$6,000 which had been deposited in his personal bank account?

A. That was also discussed during the investigation.

Q. And will you give us the date, the place, and the persons present?

A. They were all discussed about the same time, sometime in September, 1945, in the office where I was making

(Testimony of James Bryant Eustice)

the audit, in the presence of Jack Kissel and Special Agent Phoebus.

Q. Will you state what you said to Jack Kissel about this sum of \$6,000 and what he said to you?

A. He was also asked what the source of those funds were, at which he had advised us that that was part of the [319] cash received from overcharges.

Q. Did you at any time discuss with the defendant William A. Shubin the sum of \$6,688, approximately, that he spent in connection with personal expenditures?

A. In connection with those personal expenditures, they had already been set up and unless there was any difference in them, well, I accepted the figures that they had previously submitted.

Q. You are talking about the income tax activities. I am only interested in the conversations between you and the defendant.

The Court: Do you remember any conversation with William A. Shubin with reference to that item of \$6,000-odd personal expenses? Did you discuss it with him?

The Witness: I don't remember that it was necessary to; that there was any discussion on that particular item.

The Court: All right.

Q. By Mr. Strong: Did you discuss at any time with the defendant William Shubin in connection with your investigation of the Vernon Hotel & Restaurant Supply Company's income—did you discuss with the defendant William A. Shubin the question of some \$6,000 which had been used by him in 1944 to purchase a residence?

A. Yes, sir.

The Court: To purchase what? [320]

Mr. Strong: A residence.

(Testimony of James Bryant Eustice)

The Court: All right. A. Yes; I did.

Q. By Mr. Strong: Will you give us the date and the place and who was present at that discussion?

A. It was during the latter part of the audit. It must have been the latter part of September or the first of October of 1945, in the office where I was making the audit, and William Shubin was present, also Special Agent Samuel Phoebus, at which time I asked him if that was part of the—if that was money that he invested in this residence, if it was part of the money that was received from overcharges, which he had stated at that time that it was.

Q. Will you speak up a little? I have difficulty in hearing you sometimes. Did you at any time discuss with the defendant Jack Kissel in connection with your investigation of the Vernon Hotel & Restaurant Supply Company the source of funds used by him to purchase certain rugs, an 1940 Plymouth and some life insurance, the funds totalling about \$1,450?

A. Yes; those items were discussed.

Q. Approximately when, where and who was present?

A. I would place the time at sometime in September of 1945, at the office where I was making the audit, in the presence of Jack Kissel and Special Agent Phoebus.

Q. What was said by you and what was said by Mr. Kissel [321] on that occasion?

A. Well, the question was as to the source of the funds used for these purchases, and which he had advised were from overcharges.

Q. Did you at any time receive from any of the defendants or their attorneys an affidavit as to the date

(Testimony of James Bryant Eustice)

the partnership which is known as the Vernon Hotel & Resturant Supply Company was formed?

The Court: That was stipulated to by the defense at the beginning of the trial.

Mr. Strong: That is correct.

The Court: Is there any difference?

Mr. Strong: I think there may be. As I remember, they said the 14th day of November, 1942.

Mr. McLaughlin: Mr. Strong, if you had a different date, I would have been very happy to have accommodated you promptly. I took that date out of your indictment, I think. Well, it says the first of November, 1942, in the indictment.

Mr. Strong: It says the 16th of November, 1942.

The Court: Well, there shouldn't be any dispute about that. What is the date?

Mr. Strong: It is the 16th of November, 1942.

The Court: Well, let that stand in the record. Counsel for the defense will correct it if it is not correct. They know what the date was. They were willing to stipulate as to [322] the partnership and the names and date.

Mr. McLaughlin: Yes, your Honor. I do not see the materiality.

The Court: I don't, either.

Mr. McLaughlin: Whether it is the 14th or the 16th.

The Court: I do not, either.

Mr. Strong: An overt act, your Honor. That is all.

The Court: I would like to ask a question, subject to objection of counsel on either side, so I will have the record clear, because it is going to be kind of a leading question and I want counsel to always interpose an objection to the court the same as they would to opposing counsel.

(Testimony of James Bryant Eustice)

You testified to an item of \$46,000 that was called an exchange account of overcharges. Then you gave us a number of items here that you have testified to with reference to deposits in the bank. Now, is it not true that those items were taken out of the \$46,000; they are not in addition to it?

The Witness: They are——

The Court: Just a moment. Gentlemen, any objections?

Mr. Strong: Well, no objection.

The Court: I just want to clear the record. They were taken out of that, were they not?

The Witness: They are in addition to the \$46,000.

The Court: Take a recess of 10 minutes, the morning recess. [323]

(The court admonished the jury and a short recess was taken.)

The Court: Stipulate the jury are present, gentlemen?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: Stipulate the defendants are in court?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Proceed. Cross examine.

Mr. Strong: Has your Honor finished with the Witness?

The Court: Yes.

Mr. Strong: I forgot to ask him one question. May I ask him now? May I have this marked for identification, your Honor?

The Court: Yes.

(Testimony of James Bryant Eustice)

The Clerk: That will be Government's Exhibit No. 57 for identification.

(The document referred to was marked as Government's Exhibit No. 57, for identification.)

Q. By Mr. Strong: I show you Government's Exhibit No. 57 for identification and ask you if you ever saw this before?

A. Yes, sir.

Q. It consists of three pages?

A. Yes, sir; I have.

Q. Could you speak up, please? [324]

A. Yes; I have.

Q. Can you state about when you saw this the first time?

A. It was towards the end of the audit.

Q. And did you see this in connection with your investigation into the income and the source of income of the Vernon Hotel & Restaurant Supply Company?

A. Yes; I did.

Q. Will you state the date approximately when you saw it?

A. It must have been the first part of October.

Q. What year? A. 1945.

Q. And where was it?

A. In the office where I was making the audit.

Q. And who was present?

A. Mr. William Shubin and Special Agent Phoebus.

Q. Will you state the circumstances under which you first saw this Government Exhibit 57 for identification?

(Testimony of James Bryant Eustice)

Mr. McLaughlin: Well, I think the question should be who was present and where was it, and not the circumstances.

Mr. Strong: He already stated who was present and where it was.

Mr. McLaughlin: In other words, when you ask the circumstances it always gives him a chance—not that I am [325] deprecating the witness, because I am not—but I mean the circumstances have nothing to do with it.

Mr. Strong: I will withdraw the question.

Q. Did anyone give you this Government Exhibit 57?

A. Yes, sir.

Q. Who gave it to you? A. William Shubin.

Q. And did you see any of the matter which is written on here being placed on this Government Exhibit 57? A. Yes; I did.

Q. And who was placing it on that exhibit?

A. William Shubin.

Q. Will you state what William Shubin said to you, if anything, when he gave you this Government Exhibit 57 for identification?

A. Well, he gave it to me in answer to a request I had made him for this list.

Q. What had you asked him for?

A. Well, I had asked him for a list of the invoices that he had made out that didn't actually represent the sale of merchandise by which he brought the money received from overcharges onto the books of the partnership.

(Testimony of James Bryant Eustice)

Q. And did he give you this list which is Government Exhibit 57 for identification in that connection?

A. Yes, sir. [326]

Q. And did he say anything to you when he gave it to you?

A. I don't recall any conversation at the time that he gave it to me, except that that was the list that I had requested.

Q. How did you know that was the list you had requested?

A. Well, I had seen him preparing the first part of this list.

Mr. Strong: I offer this document into evidence, your Honor.

The Court: In evidence.

Mr. McLaughlin: To which we object on the ground that it is immaterial and not responsive to any issues in the indictment, and there is no proper foundation; and furthermore, it is a personal document made by one of the defendants in this case in connection with his tax matters.

The Court: Let the record show the objection was made prior to the ruling of the court.

Mr. Strong: May I show it to the jury, your Honor?

The Court: Yes; you may.

The Clerk: Government's Exhibit 57.

(The document heretofore marked as Government's Exhibit No. 57, was received into evidence.)

SALES RECORD - SINGLE PAGE FORM

MISCELLANEOUS

DESCRIPTION

INVOICE
NO.

ACCT AMOUNT

AMOUNTS FORWARDED

37087	100 00	
37144	60 50	
37185	66 00	
38036	30 60	
38408	132 00	
38417	242 00	11-22-43
38422	193 60	11-23-43
38538	99 60	Nov-29-43
39095	876 0	12-28-43
39696	1,011 40	
39740	27 00	2-2-44
39747	250 00	22-44
39750	180 00	2-3-44
39789	4824	1-9-44
39844	8125	2-17-44
39845	6000	2-17-44
39846	2000	2-17-44
39849	2750	2-18-44
39956	450 00	3-3-44
39963	506 0	3-3-44
40001	4766	3-9-44
40048	209 00	3-15-44
40086	175 05	3-21-44
4126	230 0	3-24-44
40041	123 00	3-28-44
40142	1002 0	3-28-44
40172	750 00	3-31-44
40173	3000 0	3-31-44
40175	3030 0	3-31-44
40201	10145	4-4-44
40211	10500	4-5-44
40218	18240	4-5-44
40225	178 50	4-7-44
40243	43125	4-7-44
40244	12210	4-7-44
40245	7321	4-7-44
40300	55400	4-17-44
40390	3600	4-24-44

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1000

SALES RECORD SINGLE PAGE FORM

REPTION	INVOICE NO	MISCELLANEOUS	
		ACCT.	AMOUNT

ITS FORWARDED

40422	699.00	4-24-44
40472	2050	4-28-44
40477	36550	4-28-44
40511	10500	5-3-44
40561	9000	5-7-44
40576	165509	5-8-44
40582	1310.01	5-12-44
40711	42884	5-19-44
40857	53200	5-26-44
40860	10000	5-26-44
40876	46370	5-29-44
40935	87550	6-1-44
41134	10000	6-13-44
41194	26000	6-19-44
41266	40900	6-23-44
41267	81600	6-23-44
41339	56694	6-28-44
41363	73073	6-29-44
41379	29600	6-29-44
41381	37900	6-29-44
41384	45000	6-29-44
41410	6800	6-30-44
41445	15000	7-5-44
41451	55000	7-5-44
41458	27220	7-5-44
41468	75075	7-6-44
41473	83410	7-3-44
41734	39000	7-19-44
41946	90000	7-31-44
42012	16530	8-3-44
42467	6000	8-24-44
42512	10710	8-25-44
42802	119288	9-8-44
42826	22000	9-8-44
42836	19440	9-6-44
42915	54857	9-13-44
43003	4101	9-18-44
43085	9900	9-19-44
43151	38520	9-22-44
43164	31190	9-22-44
43220	41400	9-25-44



(Government's Exhibit No. 57)
 RECORD OF SALES

PRINTED IN U. S. A.

UNIVERSAL FORM 66-54

MISCELLANEOUS

ACCT. AMOUNT

✓ ACCOUNTS RECEIVABLE ✓ CASH SALES

46193	4318	1-9-45
45884	5420	12-20-44
45883	5570	12-30-44
48528	7590	3-30-45
48504	15993	3-28-45
48374	53896	3-25-45
48299	50809	3-21-45
47874	26535	2-5-45
47870	33375	3-5-45
47525	41011	2-21-45
47395	147800	2-15-45
47354	94400	2-14-45
47303	69917	2-14-45
47131	100461	2-6-45

TOTAL \$ 657095



(Testimony of James Bryant Eustice)

Mr. Strong: No further questions. [327]

Cross Examination

By Mr. McLaughlin:

Q. Mr. Eustice, when you were given that Exhibit No. 52 you did not tell Mr. Shubin that it might be used in any criminal proceedings against him?

A. No, sir, I did not.

Q. You never told him whether it would or would not be so used? A. No, sir.

Mr. McLaughlin: That is all.

The Court: That is all.

(Witness excused.)

Mr. Strong: I will call Mr. Bircher.

DONALD OLIVER BIRCHER

called as a witness on behalf of the government, having been previously duly sworn, was examined and testified as follows:

Direct Examination (Cont'd.)

The Court: You have been sworn?

The Witness: Yes, your Honor.

The Court: State again your name for the record.

The Witness: Donald Oliver Bircher.

By Mr. Strong:

Q. Now, Mr. Bircher, you are I understand a special agent of the Bureau of Internal Revenue?

A. That is correct. [328]

Q. And did you during 1945 have occasion to investigate the income tax returns of the Vernon Hotel and Restaurant Supply Company? A. Yes.

(Testimony of Donald Oliver Bircher)

Q. And in connection with that investigation did you have occasion to investigate the income and source of income of the Vernon Hotel and Restaurant Supply Company? A. Yes.

Q. Did you at any time in connection with that investigation have a conference in your office with the defendants or any of the defendants? A. Yes.

Q. Will you state when the first of such conferences, if there was more than one, was held?

A. July 24, 1945. I interviewed William Shubin and Frederick Shubin in our office. William Shubin was in in the morning, I believe, and Frederick Shubin afterwards.

Q. And will you state who was present?

A. Each of them was accompanied by their attorneys, Stanley Anderson and Joseph D. Brady. Also present were Special Agent Phoebus, Special Agent Walter Schlick and Miss Caloway, our office stenographer, took one statement and Miss Ouida Dudney took another. I was present also.

Q. Now, did you at the conference state to the defendant William Shubin that any of the matters on which he gave [329] you information might be used against him? A. Yes.

Q. Did you indicate that that might be used against him in any kind of a proceeding? A. Yes.

Q. Will you tell us what you said.

A. I stated as follows. "I will advise you that any statements you make or any documents or evidence produced at this hearing can be used in any subsequent proceeding by the government."

(Testimony of Donald Oliver Bircher)

I also advised them that they were not required to incriminate themselves and that they had the right to refuse to answer any question if they felt that the answers might tend to incriminate them, and I also asked them if they wished their attorneys to amplify that advice, go into it any further with them, and their attorneys did give them further advice.

Q. Do you remember what they said?

A. Their attorneys urged——

Mr. McLaughlin: Objected to on the ground it is privilege.

Mr. Strong: May I be heard, your Honor?

Mr. McLaughlin: Your Honor, I will withdraw my objection to that question.

The Court: All right.

The Witness: Their attorney, Mr. Brady, advised William [330] Shubin at the first conference that while he had the right to decline to answer any questions even if he felt that to do so might tend to incriminate him, yet he advised him to proceed and answer fully any questions that were asked.

Q. By Mr. Strong: Had the Bureau of Internal Revenue issued any subpoenas calling for the presence of William Shubin at this conference? A. No.

Q. Has the Bureau of Internal Revenue at any time issued any subpoenas calling for the presence of William Shubin at any conference? A. No.

Q. Has the Bureau of Internal Revenue issued any subpoenas of any kind for any purpose directed to William Shubin? A. No.

Q. Did the defendant William Shubin so far as you know appear voluntarily at this conference?

(Testimony of Donald Oliver Bircher)

Mr. McLaughlin: Objected to as a conclusion.

The Court: Yes, it is a conclusion. State the facts.

Q. By Mr. Strong: Did Mr. Shubin at any time during this conference indicate that he was not willing to give any information that was sought by the Bureau of Internal Revenue?

Mr. McLaughlin: Objected to as leading and suggestive.

The Court: No, because if he said he would not, it would be admissible. Overruled. [331]

Q. By Mr. Strong: Go ahead.

A. Mr. Shubin stated that he appeared voluntarily and would willingly and truthfully answer all questions.

Q. Did you at that conference ask Mr. William Shubin questions and did he give answers respecting the income and the source of income of the Vernon Hotel and Restaurant Supply Company? A. Yes.

Q. Were you investigating any particular years as to the income of that concern?

A. Yes. I told them that we were investigating the years 1942, 1943 and 1944.

Q. And was there any overall sum for the three years that you were discussing with the defendant William Shubin at this conference?

Mr. McLaughlin: Now, your Honor, I wish to object to that question and before your Honor rules, may I take the witness on voir dire?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, on the occasion of your discussion that you have been describing, you had a court reporter there who took down all questions and answers of the parties, did you not?

(Testimony of Donald Oliver Bircher)

A. Yes, at one of those conferences there was some discussion off the record but where that occurred it shows on the [332] transcribed record, and that was in connection with the advice of their attorneys regarding their admonition. That is the only conversation that occurred off the record.

Q. Now you had asked these three parties to come up there and give a statement before they came?

A. No. I had asked their attorneys. I told their attorneys that we were going to investigate the income tax liability of the Vernon Hotel & Restaurant Supply Company in connection with the amended returns which had been filed a few days prior and that I desired to talk to them if they wanted to come in and give a voluntary sworn statement.

Q. Well, did you tell their attorneys that you were investigating the income tax returns filed by the individuals?

A. I cannot recall definitely. The individuals and the partners had all filed amended returns and I told their attorneys that I would like to have them come in and discuss the matters.

Q. Yes, and when they came in either then or prior to that time you told them that a court reporter would take down the questions and answers? A. Yes.

Q. And then you told them that after they were taken down they would sign those or have the opportunity of signing them and you would retain the signed copies in your files? A. Yes. [333]

Q. And you did do that thing?

A. That is correct.

(Testimony of Donald Oliver Bircher)

Mr. McLaughlin: Mr. Strong, will you stipulate that the three exhibits for identification—what are the numbers?

Mr. Strong: 50, 51 and 52.

Mr. McLaughlin:—50, 51 and 52 are the three statements you offered in evidence yesterday from the files of the Internal Revenue Department?

Mr. Strong: Yes. I will so stipulate.

Mr. McLaughlin: Well, at this time, your Honor, I object to any further questioning on that transaction on the ground that it is an indirect attempt to put into evidence statements made by these parties which are taken down in writing and which are in substance embodied as supplemental returns.

Now, in these cases we were discussing yesterday these very things I mentioned. It characterizes them as in the nature of supplemental returns and to permit a witness to testify to a discussion and conversation which was nothing more than a running question and answer affair which was put down on paper and signed is, I submit, in controversion of the regulation and the Act that we were arguing yesterday.

The Court: No, I don't believe so, counsel. I think that that Act pertains to returns or supplemental returns that are filed in which there is no preliminary such as we have here now. The court looks upon it as a complete waiver. [334] The defendants appeared and offered to make these statements and were told that they might be used subsequently. No objection was made and I believe that comes under the statutory provisions that we discussed yesterday.

(Testimony of Donald Oliver Bircher)

I will overrule it and allow an exception to the defendants .

Mr. Strong: May I have my last question read?

The Court: Read the question, Miss Bennallack.

(Question read as follows:

“Q. And was there any overall sum for the three years that you were discussing with the defendant William Shubin at this conference?”)

The Witness: Yes.

Q. By Mr. Strong: What was that sum?

A. Approximately 141,000 overcharges that were received during that period, November 16, 1942, to December 31, 1944.

Q. Did you ask the defendant William Shubin what the source of these funds of the Vernon Hotel & Restaurant Supply Company were? A. Yes.

Mr. McLaughlin: Now, your Honor, in order that I may preserve my objection to this line of testimony, may it be stipulated that I object on the ground that it is a violation of the statute and the regulation to which I referred, and [335] also that it is immaterial and it is not properly admissible evidence?

The Court: Yes. Let the record show that that objection may stand as to all his testimony. Overruled. Exception allowed. Proceed.

The Witness: May I have the question again?

The Court: Repeat the question, Miss Bennallack.

(The question was read as follows:

“Q. Did you ask the defendant William Shubin what the source of these funds of the Vernon Hotel & Restaurant Supply Company were?”)

The Witness: Yes.

(Testimony of Donald Oliver Bircher)

Q. By Mr. Strong: What did he say?

A. He said they were from overcharges and I asked him what he meant by overcharges and he said collections in excess of the OPA ceiling prices or in excess of the invoice prices.

Q. Did you ask how these overcharges were collected?

A. Yes.

Mr. McLaughlin: If your Honor please, I object on the ground that that is leading and suggestive in addition to the other objection.

The Court: Overruled.

Q. By Mr. Strong: What did he say?

A. William Shubin said that he usually collected the [336] overcharges himself in cash at the time each transaction occurred; that occasionally his two partners, Frederick Shubin and Jack Kissel, collected overcharges and handed them to him.

Q. Did you ask defendant William Shubin whether these overcharges were recorded on the invoice of the Vernon Hotel & Restaurant Supply Company?

A. Yes.

Q. What was his answer?

A. He said the overcharges were not recorded on the invoices. The invoices usually stated just the ceiling prices of the meat.

Q. Did you ask defendant William Shubin what the procedure was for collecting the charges shown on the invoices and that shown for collecting the overcharges?

A. Yes.

Mr. McLaughlin: In addition to the objection, I again object on the ground that it is leading and suggestive.

(Testimony of Donald Oliver Bircher)

The Court: Well, counsel, I think you should frame your questions so as to avoid any suggestion of what the answer might be. Read the question again.

(Question read.)

The Court: You see, you suggest to the witness very definitely. It may be that the question wasn't answered or asked at all. I think the better method of asking a question is "What did you say, if anything, about the method of [337] collecting these overcharges?" instead of making it so definite.

Mr. Strong: I will withdraw the question.

Q. What, if anything, did William Shubin say as to the method of collecting the overcharges billed on the invoices?

A. He said that the charges billed on the invoices were usually paid by check, not always, but usually paid by check to the cashier.

Q. What, if anything, did the defendant William Shubin say as to the method for collecting the overcharges?

A. He said that those were usually collected in cash at the time that the sales were made in addition to the invoice prices for the goods sold, and that the cash was usually collected in secret, that is, in a place in the cooler or outside of the vision of most of the employees around the office.

Q. What, if anything, did William Shubin say as to the amounts of the overcharges?

Mr. McLaughlin: If your Honor please, I submit he might just as well ask him the same way. He is just leading the witness and after all, this witness was there. He can tell what was said.

(Testimony of Donald Oliver Bircher)

The Court: Yes, just tell the conversation. That is the best way. Counsel is correct. Give the conversation [338] between yourself and the Shubins with respect to these matters.

The Witness: I asked Mr. Shubin to describe what he meant by overcharges that he had collected and that he said his partners had connected, and he said that the overcharges were amounts in excess of the OPA ceiling prices and in excess of the amounts listed on the invoices when the goods were sold. [339]

I asked him whether he showed preference or whether he overcharged all of his customers the same amount during the same periods and he said that he didn't overcharge them all the same amounts, that he was looking to postwar business and that he showed some preference in making overcharges, and he said he usually kept those overcharges in a record for a few days or a current record of them on a slip of paper; he usually collected them at the moment he made the sale but sometimes that they would come in a day or two later and pay the overcharges and then he would scratch their names off the list and then when he had all their names scratched off the list he had before him for overcharges, he would then throw the list away.

He said he kept the cash in a drawer in the office or in his pocket for a few days at a time and then took it home and hid it, and that he kept it all together until he needed it. He said finally at different times when he and different partners would want money he would give it to his partners and occasionally made an accounting to them. He said they would ask him how they stood and he would tell them that he would give them an accounting as to how

(Testimony of Donald Oliver Bircher)

these overcharges amounted as soon as he could count it and that he sometimes did that.

He said he usually collected the overcharges himself but on other occasions both of his partners would collect them and [340] turn the sums over to him, that they all trusted him and that he kept the funds together and finally when they got ready to file these amended returns that they had used up some of the cash funds but they still had something in the neighborhood of \$70,000 left in cash and that they could get it and used it when they filed their amended returns for the amended returns of the Vernon Hotel and Restaurant Supply Company.

Q. Did you ask him anything about whether the Vernon Hotel and Restaurant Supply Company had to pay overcharges on meat it purchased?

Mr. McLaughlin: Objected to as leading and suggestive.

The Court: Yes, I think it is. Ask him if there was any other conversation.

Mr. Strong: Well, may I submit to your Honor that the conversations here took quite a long period of time and it would be very difficult for the witness to remember everything, and unless I can point to something specific——

The Court: There is no objection to your mentioning an item but not just as definitely as you do, counsel.

Q. By Mr. Strong: Was there anything said about the Vernon Hotel and Restaurant Supply Company's purchases of meat?

A. I don't recall that I asked William Shubin whether they overpaid when they purchased meat, but I did ask the other partners for that information. [341]

(Testimony of Donald Oliver Bircher)

Q. That was at another conference? A. Yes.

Q. I just want this one conference discussion now. Was anything said about how the overcharges were computed?

A. I asked him how he determined and who determined how much overcharges should be collected from each of his customers and he said he usually determined those himself as to how much to overcharge at any particular time or any particular period. He said that he didn't overcharge on back fat but he did on beef and he said that he only overcharged—what in substance he said was that he only overcharged what he thought was reasonable at any particular time because when he was getting a larger price for lard then he didn't have to overcharge so much in order to keep things running smoothly.

He said that the customers usually did not have to be prompted about making their payments of the overcharges, that he had them trained and that if they wanted to get meat they knew they had to come forward, that he did not have to prompt them about it.

Q. Was anything said about making entries of these overcharges on records of the Vernon Hotel and Restaurant Supply Company?

A. William Shubin said that he did not enter overcharges as a rule because he did not want the OPA to find such [342] a record that they were overcharging.

He said, however, that they did enter some of the overcharges by preparing fictitious invoices and plugging in some of this money that was represented by overcharges. Occasionally they would need money in the business and they would plug in some of the money by creating fictitious

(Testimony of Donald Oliver Bircher)

invoices covering some products that did not require red points such as pigs feet and so forth.

Q. Was there anything said about the distribution of these overcharge receipts?

A. William Shubin said that he and his two partners shared equally in the profits of the business and in the profits from the overcharges. He said he didn't distribute the funds but that each of the partners were permitted to withdraw or get funds or advances from this fund. [343]

Q. Was anything said about the knowledge of the other two partners as to these overcharges?

A. Yes. He said——

Mr. McLaughlin: Objected to on the grounds that it would be hearsay as to the other two partners, anyway. They were not there.

The Court: When did this conspiracy terminate, Mr. Strong?

Mr. Strong: At the date of the issuance of the indictment.

Mr. Neukom: March 13th, I believe, this year.

Mr. Strong: That is right.

The Court: The conspiracy was then in existence at the time of this interview?

Mr. Strong: No; I don't believe so, your Honor—oh, yes; it was, your Honor. I am not offering that as against the others, anyway, so that I will withdraw it just to save time.

The Court: All right. I will say to the attorneys, if you will return at 1:30 I will hear your legal argument.

(Whereupon, the jury were admonished and excused until 2:00 o'clock p.m., and an adjournment of the case taken until 1:30 o'clock p.m.) [344]

Los Angeles, California, Thursday, June 20, 1946,
1:30 p.m.

The Court: Mr. Cross, will you call the case?

(Case called by the clerk.)

Mr. Strong: Ready for the Government.

Mr. McLaughlin: Defendants are ready and defendants are present.

The Court: Let the record show the jury is not in the courtroom.

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: I will hear your argument.

Mr. McLaughlin: Your Honor, the motion which I propose to make to dismiss the proceedings at this time is supported by the New Rules, which provide that a motion to dismiss is part of the method to bring up any defect in connection with the indictment or the proceedings before the Grand Jury. And I direct your Honor's attention—I assume your Honor is familiar with Rule 6, sub-paragraph (e), which states that:

“Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters [345] occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that

grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."

In reliance upon that Rule, I think that I should ask Mr. Strong if he will stipulate that the returns which have been offered into evidence here, that is, the income tax exhibits 35 to 49 and the statements, the sworn statements which were filed with the Department of Internal Revenue and which are marked as for identification 50, 51, and 52, were exhibited to or read to the grand jury.

Mr. Strong: Well, your Honor, I think that that is not so; and the returns, the dates of the returns, the certified copies, show on their faces when we got them, and the indictment date is shown on the indictment, and a mere comparison of the two will disclose that that could not have been so.

Mr. McLaughlin: Mr. Strong, I had not noticed that. Let us take them one at a time now.

Mr. Strong: I may state that I have no recollection of that happening at all.

The Court: Have you any evidence that it did, Mr. McLaughlin? [346]

Mr. McLaughlin: Well, your Honor, I think that in the discussion yesterday, Mr. Strong in discussing those three statements which he sought to introduce into evidence, at the time the Grand Jury began to deliberate, he said, we did not know the names of all these parties at that time; and, he said, that is why we did not put them down. I assume that he, in writing for those things last fall, if he did, wrote for them for use in connection with the Grand Jury.

The Court: The record now shows, unless you have something different, that that is not correct.

Mr. Strong: May I say something? I do not see what the letters which we wrote have to do with this Grand Jury altogether.

The Court: Well, I want Mr. McLaughlin to make his record.

Mr. Strong: Yes.

The Court: Because the defense are entitled to that.

Mr. Strong: I have no recollection of any of these documents being used before the Grand Jury; and I can say that, as far as I remember, none of these letters were used before the Grand Jury and I do not remember of any statements being used.

The Court: All right.

Mr. McLaughlin: Mr. Strong, when you say you do not remember any statements being used before the Grand Jury, [347] do you include in that those three statements?

Mr. Strong: Those are the ones I am talking about. I am talking about those three statements.

The Court: 50, 51, and 52?

Mr. Strong: Yes.

Mr. McLaughlin: And they were not so read or exhibited?

Mr. Strong: I do not recall their being read at all at any time.

The Court: Unless the defense counsel has some evidence to the contrary, I suppose that must be accepted by the court.

Mr. McLaughlin: I think that is right, your Honor.

The Court: That would be true on that point. Have you some other point, Mr. McLaughlin?

Mr. McLaughlin: Well, it is tied in with this, although a distinctly different point. I am going to make it now, as long as we have some time.

The motion which I was going to make was that evidence which had been illegally obtained was used before the Grand Jury. Mr. Strong states to the court it was not; so, on his statement, we accept that.

The other motion that I was going to make was that there was not sufficient evidence offered before the Grand Jury to show the commission of a crime.

Now, there again, I will be very frank with the court, and I was going to premise that motion on the same contention [348] and I realize that your Honor has discretion in inquiring into whether there was sufficient evidence or not; and I think that any objection I might advance, in view of the fact that letters were written last fall when this investigation was under way, and that at least the United States Attorney had them in his possession, that I should request permission to have the transcript examined and the minutes examined to see whether there was evidence of a crime as shown in the indictment.

Mr. Strong: May I just say one thing, your Honor? I want to state categorically to your Honor and the counsel for the defendants that I at no time had possession of any of these written statements or documents prior to the people being authorized to hand them down by the Internal Revenue Commissioner.

The evidence which was before the Grand Jury was amply sufficient to warrant the Grand Jurors indicting these people, and it had nothing to do with these statements, as I recall.

And this motion is not timely, your Honor, under 18 U.S.C. 556 (a). This motion has to be made within ten days after the parties are presented for arraignment. It is now way beyond ten days after that date, and I know of no difference as to that.

As to disclosing what happened before the Grand Jury [349] simply upon counsel's statement that he might feel that this letter I wrote, asking authority to use these statements, that they might not be sufficient in evidence, I submit that is no basis for disclosing the proceedings.

Mr. McLaughlin: Your Honor, these letters are dated October 10, 1945, and the indictment reflects that it was brought by the Grand Jury in January of 1946; and the letters here reflect that these documents were being obtained by the United States Attorney—I had better not be too inaccurate about it; I will get Mr. Strong's own letter. [350]

I might say further, your Honor, that the evidence produced in this proceeding amply demonstrates the fact that the grand jury had a basis for issuing the indictment. I think if even only a small portion of the evidence introduced here had been shown to them that it would have been a full basis for the issuance of the indictment without more.

Mr. McLaughlin: Well, I can't cover that first. Now, this letter which is part of Exhibit 55, and it is the letter signed by Charles H. Carr—I assume Mr. Strong wrote it—reads as follows:

“In the above-entitled matters the defendants are to be charged with conspiracy to violate, and with various violations of the Emergency Price Control Act.

“We are now in the process of conducting a grand jury investigation into the activities of these companies and individuals. Agents of the Bureau of Internal Revenue, in connection with income tax returns of the named individuals and concerns, appear to have been furnished certain information which will be very pertinent to the trial of the case arising from the instant investigations.

“Will you please secure the authority of the Commissioner of Internal Revenue for Special Agents D. O. Bircher and Samuel Phoebus, and Internal [351] Revenue Agent J. Bryant Eustice to testify on the trial of the above-entitled case, and to furnish such information and documents as are in their possession, pertinent to said case?”

Now, the intention apparently was to use those things and quite obviously, and there again I have to guess because I wasn't there, but quite obviously he is there asking to use Internal Revenue Agent J. Bryant Eustice and D. O. Bircher and that those men in testifying would have used those statements to refresh their recollection, and the whole thing comes down to the point that I want to argue in this case that even if they weren't actually introduced before the grand jury they were obtained by the United States Attorney and the United States Attorney procured them from the Internal Revenue Department to come into court and testify to matters which were also set forth in those things if they did not exhibit them to the grand jury and I submit that the material contained in those is confidential and that the United States Attorney unlawfully obtained it for purposes in connection not only with the grand jury but also in connection with the investigation.

The code section which is involved in this case makes a specific provision against the use of income tax returns for any purpose except as authorized by regulations. Now, there must have been reason for adopting that code section and the only policy reason that I can see for adopting such a regula- [352] tion was to afford some protection to taxpayers who are required in their returns to set forth the facts as to where they got their income

and so forth. The government is interested in collecting taxes and it wants to afford a certain amount of confidence or privacy to persons who are truthful enough to submit their returns honestly and who may have obtained income in some manner that may or may not violate the law.

The government collects that money as income and it rightly should and in order to encourage people to make accurate returns and not be jeopardized by criminal prosecution, I think that statute was enacted for that purpose.

Now, the regulation goes along and it does not say that the Commissioner shall in all instances furnish it to the government. It states some conditions there and as your Honor observed yesterday it shows that there is some discretion which must be exercised. Otherwise there would be no purpose for any regulation. The statute might just as well have read and said and the regulation too that whenever anybody in the government wants a copy they shall have it, but it did not say that and I submit therefore that this is a very important statute and if it is to be just slid over and disregarded in all these matters that it is being nullified, and I submit that when the United States Attorney obtains one of those returns in violation of the statute or not in com- [353] pliance with the statute and rules and regulations and uses it in connection with getting information for an indictment and perhaps for use, according to this letter he certainly intended to use the two agents out here whom he mentioned and any documents that they have in their charge, and I submit that they have violated the laws of this country with respect to search and seizure and that the indictment for that reason should be quashed.

Now, this is not a new question.

The Court: Oh, no. I am familiar with it.

Mr. McLaughlin: Yes; and also Mr. Strong stated that we waived at the time. In these situations when you don't know a fact, when you first discover it and you bring it to the court's attention, why, that is sufficient.

There is one case that I would like to mention and I know your Honor is familiar with it, *United States v. Potts*, reported in 141 Fed. (2d) page 45. That was before the new rules. It states that a motion to quash is a proper method to attack any proceeding which was defective before the grand jury. Now, I want to refer your Honor to the cases which I think are directly in point and which show that there has been diversity in this case that transcends the complaint in this case at bar, assuming that these parties are as guilty as the government contends that they are. I submit that the rule of privacy that the attorneys for the government have [354] violated in this case and is more important and it is more important to preserve those rules than it is to seize upon a particular instance and disregard it.

Now, in the case of *United States v. Smith*, that is District of Missouri and was decided in 1938. It is reported in 23 Fed. Supplement 528. In that case two police officers who were police officers of the police department of St. Louis worked with FBI agents also in connection with making arrests, and the testimony showed that the two police officers had entered the residence of the defendant without any warrant or search warrant and had placed the defendant under arrest and then made the defendant reach into her clothes and take out a package containing narcotics and deliver the same to the officers.

Now the accused made a motion to suppress the evidence and quash the indictment and the court held that

the indictment should be quashed and said, at page 529, and I desire just to read this because I think that the language as to the policy behind these rules that protect defendants against certain things that they should be protected against is worthy of preservation. At page 529 the court said:

“It is clear that if this seizure had been made by the federal narcotic agents that it would have been in violation of the Fourth Amendment, and the motion to suppress would have to be sustained. [355] It is true that the Fourth Amendment is not directed to individual misconduct of state officers.” Then they cite the *Boyd* case and others. Continuing:

“But here we have a case where these police officers are assigned and work regularly with the federal narcotic agents; where they testify that they accompany them on raids, where they have search warrants; and where they testified that any cases they make they turn over to the federal authorities. Ordinarily the use of this evidence would not be prohibited, because of the fact that it had been secured in an unlawful manner by state officers; but we have here a case where the state officers are regularly detailed to work with and cooperate with the federal narcotic agents, and when they made cases they turned them over to the federal authorities.

“If, under the state of circumstances, the evidence is not suppressed citizens would be afforded small protection from unlawful search and seizure under the Fourth Amendment to the Constitution of the United States. As was aptly said by Mr. Justice Bradley in *Boyd v. United States*: ‘Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent [356] approaches and slight deviations from legal modes of pro-

cedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any self-encroachments thereon.'

"In *United States v. Falloco*, D. C. 277 F. 75, a case involving a very similar state of facts, Judge Van Valkenburgh, said at page 82:

" 'I do not think it necessary to show that the officers of the government had special knowledge, or issued special directives, in each specific case. If we were to ignore this circuitous, uninterrupted, but substantial evasion of the Fourth Amendment to the Constitution of the United States, even though that evasion was unconscious and unstudied, we should countenance a departure from the spirit of our fundamental law more harmful in its far-reaching effects than the evil here sought to be remedied. Nothing herein said is to be construed as a surrender of [357] the right of the government to avail itself, without stint, of evidence incidentally secured by state officers under the rules, principles and conditions announced by the Supreme Court and other courts of the United States. I simply hold that, under the situation here presented by the record, the police officers in the cases at bar were so far recognized agencies of the government in the enforcement of the * * * law that their acts must be governed by the limitations imposed by the federal Constitution.'

"The language used by Judge Van Valkenburgh above could well be applied to the instant case.

"The motion of defendant to suppress the evidence and quash the indictment sustained."

Another case where evidence was illegally obtained by an unlawful search and seizure and which gave rise to a quashing of the indictment is the case of *United States v. Bush* and that is a district court, Western Division of New York, 1920, cited in 269 Fed. at page 455, and in that connection the defendant was indicted for criminally receiving stolen property in violation of the so-called Carlin Act passed by Congress, and the officers had arrested the defendant and seized certain underwear. It was alleged that underwear and other things were stolen and when they arrested the [358] defendants they seized this stolen property.

Now, in holding that this indictment should be dismissed, the court said at page 457:

"The government next contends that the arrest was made by a city police officer, a stranger to the proceedings, and therefore this court should not inquire into the manner in which the evidence was obtained." Citing some cases.

"The facts, however, are not widely different from the *Flagg* case, where the evidence was brought to the federal building by a policeman who acted, the court held, as agent of the government. It makes no difference that a city police officer actually made the arrest in the belief that a felony had been committed. Certainly the clues and leads and information necessary to find the indictment were procured by government officials. In *People v. Kinney*, 185 N. Y. Supp. 645, recently decided by Judge Brown, of the Supreme Court of the State of New York, it was shown that a policeman having a search warrant authorizing a search of the home of the defendant for opium in conducting the search found a concealed loaded revolver, seized it, and later an indictment was found against the defendant for having in his possession a re-

volver without a permit. [359] The indictment on motion was dismissed. So here the officers possessed no proper search warrant for searching the home of the accused and seizing any stolen property, and therefore their discovery or information unlawfully acquired could not be used as a basis for an indictment for criminally receiving stolen property."

I have one more case, your Honor, and that is the case of *United States v. Yuck Kee*, and that is a district of Minnesota, Fourth Division, 1922, reported in 281 Fed. at page 228, and there again a motion was made to quash the indictment because evidence was unlawfully obtained. It was contended that the warrant had been unlawfully obtained in that there was no sufficient evidence filed as the basis for the search warrant actually issued and that the search warrant was not read to the defendant at the time of the search and seizure and that no copies of the search warrant were served upon them.

There are several other reasons. The main thing was that it was held to be improperly issued and the court held that under those circumstances the evidence obtained by that method could not be used and that the indictment should be quashed.

Now, your Honor is familiar I am sure with the *Boyd* case because the *Zap* case was before your Honor not long ago. [360] That case involved a question of whether a waiver had been permitted. The *Boyd* case is a leading case and it lays down rules which are certainly wholesome and I think should be abided by.

Now, the result of what has happened in this case regardless of whether these returns and whether these statements were shown to the grand jury or not is that the United States Attorney obtained without lawful au-

thority and without complying with the regulations which were adopted pursuant to law, obtained evidence and information which is the basis from which it has been his springboard in this whole case and I submit that the defendants have certainly been deprived of their constitutional rights.

I want to say this, that there is one case that even hints and it does not clearly hold that a defendant has the right to object to a personal individual income tax return being used even in spite of those regulations.

Now, that point is slightly different because I am standing upon the fact that they did not comply with the regulations and the law, but the case I have in mind is the case of *Lewy v. United States*, Seventh Circuit, 1928, reported in 29 Fed. (2d) at page 462. Now, in that instance the defendant was convicted of using the mails to defraud and Lewy Bros. was the corporation, and the court permitted the returns, the income tax returns of the corporation, to be [361] offered and received in evidence in the criminal trial against the defendant, and the court in saying that there was no error by doing that said—I do not have the quotation but I have the note that the returns were personal of the Lewy Brothers and not of the defendant, and the reason for the notation is not entirely clear unless the court was implying that the defendant's personal returns could not be used against him. I will state this, the language is quite puzzling in that case but in stating that the returns were properly used it noted that they were returns of the corporation, and I submit I don't think that the question as to whether returns regardless of compliance with the regulation has ever been passed upon insofar as the constitutionality of that statute is concerned, but I submit that if we do say

that under any circumstances they can be used, we are running squarely up against the amendment to the constitution which protects a person against such thing as that because the law requires you to make a return and where you have to do something and have to do it honestly and correctly the law and the amendments to the constitution should protect you.

Now, I add that as just a further and additional observation on this whole business. I think it is sufficient in this case to rely upon the fact that they did not comply, that they reached out and got everything they wanted unlawfully, and in connection with the motion to dismiss I also [362] want to make a motion to strike all of the evidence which relates to these returns, well, all of the evidence in the case because the case was built from the information that was obtained.

The Court: In view of the statement of the government the motion to quash will be denied and exception allowed the defendants. The motion to dismiss will be denied and exception allowed the defendants.

Mr. Strong: May I make just one statement, your Honor? In view of the fact that counsel for the defendants has here permitted himself to make all sorts of statements as to the illegality of our action and that we have obtained illegal information and violated the law, I simply want to state categorically for the record that there is no illegality here. There has been none shown, and the only possible basis for that is possibly simply counsel's wishful thinking. There is no evidence to that effect here whatsoever and the government has proceeded in due conformance with the statutory requirements as these letters to the Attorney-General to secure the returns and various other documents fully demonstrate.

(Testimony of Donald Oliver Bircher)

The Court: Call the jury. Can you give me some idea of how long it is going to take you, gentlemen?

Mr. Strong: I think we will finish late tonight or early tomorrow.

The Court: Then we will finish late tonight. [363]

Mr. Strong: May we have a two-minute recess before the jury is called?

The Court: Yes. We will take a recess.

(Short recess.) [364]

The Court: Proceed, gentlemen. Stipulate that the jury is present?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: And the defendants are in court?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: Proceed.

DONALD OLIVER BIRCHER,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

(Direct Examination (Resumed))

By Mr. Strong:

Q. Now, do you recall any further conversations that you had with the defendant William Shubin at the conference on July 24, 1945, which you were relating prior to the recess here this morning? A. Yes.

Q. Will you please state them?

(Testimony of Donald Oliver Bircher)

Mr. McLaughlin: Your Honor, before that question is asked, may I ask the witness a question on voir dire?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, how long has it been since you have read the statements that these gentlemen [365] gave to you which you describe?

A. I went over them this noon.

Q. And before you testified this morning, you had gone over them then, hadn't you?

A. Yes; I have read them occasionally.

Q. And the testimony that you have thus far given and which you are going to give to this question is the result of refreshing your recollection by reading those statements? A. Yes; I think so.

Mr. McLaughlin: Your Honor, I object to the question on the ground that he is testifying, not from personal memory, but from the contents of documents which are not admissible.

Mr. Strong: Your Honor, that is not what he said. He said that the testimony was the result of refreshing his recollection. Now that he has refreshed his recollection, that is what he is testifying to.

The Court: The record should be clear on that, because, if he is relying entirely upon some instrument or document, it is a question whether the testimony is admissible at all.

Mr. Strong: I think the record should show that the witness is not looking at any document while he is testifying.

The Court: That is true.

Mr. Strong: He may have some documents that he looked at during recess, but he does not look at them while he is testifying. [366]

(Testimony of Donald Oliver Bircher)

The Court: Any evidence that he remembers, himself, as occurring between himself, of course, is admissible, and he can refresh his memory, but not rely entirely upon a document that is not in evidence. That is true.

Mr. Strong: May I ask the witness a question?

Q. Did you refresh your recollection from the document or are you relying entirely upon the documents that you just discussed?

A. I have just refreshed my memory from reading it. I don't think that I learned anything that I didn't already have in mind before reading it.

The Court: Proceed.

Mr. McLaughlin: May I ask a few more questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, before you testified this morning you read those statements, didn't you?

A. I have read them partly. I don't know that I have read them completely and I don't know that I have even read them completely now, but for a long time I have had the substance of all of them in mind.

Q. How many times did you read them immediately prior to your testimony this morning, or any parts of them?

A. Oh, I would say six or seven times; in fact, I read them over once or twice before they were signed, during the time they were being reviewed by the defendants, and I have [367] read them over during the time I was writing reports pertaining to them. I have read them over a number of times.

(Testimony of Donald Oliver Bircher)

Q. Did you read any of those three statements clear through just immediately before you took the witness stand this morning, within the last two or three days?

A. I think I read over the first one, that is the one of William Shubin, but I don't think I read over either of the other ones completely through. I have merely glanced at them.

Q. Which one did you read this noon?

A. I looked them all over merely casually.

Q. What evidence were you trying to refresh your mind on that you did not know?

Mr. Strong: I don't think that is a proper question.

The Court: Well, I will permit it.

A. I didn't have any particular fact in mind. I just thought that I might refresh my recollection. We discussed many things, of course, during those interviews. It extended quite a period of time.

Q. By Mr. McLaughlin: Are you able to state what facts you can testify to today if you had not read those statements within the last few days?

Mr. Strong: I don't think that is material, your Honor.

The Court: That is a conclusion. I don't suppose any witness would know how to answer that. Continue, if you have [368] any other questions.

Mr. McLaughlin: I have no other questions, your Honor.

The Court: All right; proceed. The motion is denied.

Q. By Mr. Strong: Will you state your answer to the question? Would you like the question read?

A. No; I think I remember it. During the interview with Mr. William Shubin, that is the first one of the

(Testimony of Donald Oliver Bircher)

three partners that I interviewed, I recall I asked him how he usually figured his overcharges that he collected and whether he figured so much per pound; and he said that he usually just advised the customers by stating: "You owe me so much." He said that he had them educated.

The Court: Well, that was testified to this morning.

The Witness: Yes.

The Court: That is all repetition.

Q. By Mr. Strong: I wanted additional facts, not repetition, if you remembered any.

A. He said that he always wanted to report the full amount of the income of the partnership, including their income from the regular profits from their business as well as their overcharges, but that they didn't dare record their overcharges because they were afraid that the OPA officials would find that——

The Court: That is repetition. That was gone into this morning. [369]

Q. By Mr. Strong: Would you think for a minute to yourself over what you testified this morning, and then if you have any additional matters, testify to those.

A. He said that he had sought legal counsel regarding a method by which they could properly report the overcharges; and that he had consulted two attorneys, Mr. Henry Grossman and Mr. del Valle. He said he had consulted Mr. del Valle at about the time they started to collect the overcharges as to a proper method of recording the overcharges so they could properly pay taxes on them, on such income, and that finally Mr. del Valle urged him to report them, report the overcharges: and he stated that he had suggested to Mr. del Valle that they might be able to report them as gambling games, as poker or horse race

(Testimony of Donald Oliver Bircher)

winnings; and Mr. del Valle discouraged him from classifying them as such. And then, finally, he said that his attorneys, Mr. del Valle and Mr. Grossman, found a proper way to report them in that they had contacted other attorneys, and finally contacted the Mr. Joseph Brady who had mentioned for them to hire a certified public accountant to come in and make a thorough audit of all their records. And Mr. Shubin said that he made a full disclosure of all the income and all the omitted income to Mr. Rausch, C.P.A., and that Mr. Rausch had prepared amended returns and included in those returns for the partnership a total of \$141,125 that had been omitted in the original returns for the partnership for that period [370] November 16, 1942, to December 31, 1944.

He said he had made a full disclosure to his C.P.A. and a letter on the stationery of Mr. Rausch was submitted by him and read by me at the time, covering Mr. Rausch's statement, and Mr. Shubin verified that all the statements in Mr. Rausch's letter were true to the best of his knowledge and belief, and that the amended returns did make a full disclosure and properly apportion all the income.

That is all that I remember at this moment.

Q. Did you at any time, on that occasion or subsequent thereto, receive from the defendants a copy of the report of the auditor or accountant they had hired to go over the income of the Vernon Hotel & Restaurant Supply Company?

A. Yes.

Mr. Strong: May I have this marked for identification, your Honor?

The Clerk: Government's Exhibit No. 58 for identification.

(Testimony of Donald Oliver Bircher)

(The document referred to was marked as Government's Exhibit No. 58 for identification.)

Q. By Mr. Strong: I show you Government's Exhibit 58 for identification and ask you if you ever saw this document before? A. Yes; I have.

Q. Will you state when and where and who was present? [371]

A. On August 1, 1945, at our office on the eighth floor, Mr. Jack Kissel appeared with his attorneys, Mr. Joseph Brady and Mr. Stanley Anderson, for the purpose of giving a voluntary sworn statement.

Mr. McLaughlin: Just a minute. I submit the question has been asked.

The Court: It has been answered.

Mr. McLaughlin: I mean asked and answered.

Q. By Mr. Strong: Did you at that time receive this Government Exhibit 58 from anyone?

A. Yes; Attorney Stanley Anderson handed that to me in the presence of Mr. Jack Kissel, and I put it down on the——

Q. Just a minute, now. Was anything said at that time?

A. Yes. I asked Mr. Jack Kissel and the attorneys whether this report represented the audit of C.P.A. Henry Rausch, and casually glanced through it, opened up the report.

Q. What did they say?

A. They said that it did represent the audit.

Mr. Strong: I offer this into evidence, your Honor.

Mr. McLaughlin: Just a minute. May I ask the witness a few questions?

Mr. Strong: Yes.

(Testimony of Donald Oliver Bircher)

The Court: Yes. [372]

Q. By Mr. McLaughlin: Was Mr. Kissel there?

A. Yes.

Q. And who else was there among the defendants?

A. No other defendant. Attorney Joseph Brady and Attorney Stanley Anderson for Mr. Kissel.

Q. That document was handed to you in connection with information relating to their personal returns?

A. No. The audit itself and the report says it is in connection with an audit of the Vernon Hotel & Restaurant Supply Company; and it is so captioned in that opening statement.

Q. But you were investigating—pardon me, go ahead.

A. And it is so captioned in the cover letter which is signed by Mr. Rausch, and which letter is dated July 24, 1945.

Q. Well, at that time you were investigating and had under your investigation the matters of the individual returns of William and Frederick Shubin and Jack Kissel, did you not?

A. Yes; also the tax on the income of the partnership, which had to first be determined.

Mr. McLaughlin: Now, if your Honor please, I object to that on the ground that it is another document which comes within the category of the supplement to an income tax return, and it has not been shown to have been obtained in accordance with the rules and regulations and the law relating [373] to it. And in this connection I make the further objection that it is privileged, and if there is any answer to that, certainly there has been no waiver of any privilege insofar as the two Shubins are concerned.

(Testimony of Donald Oliver Bircher)

The Court: Well, I think a voluntary presentation of a statement in the presence of the defense attorneys and advice of his attorneys to this witness—I don't see how you can call that privileged when he hands it to him. And secondly, I do not believe that this comes under the rule of the statute, the statutory rules that we discussed, because this has never been a part of the Government's records at all so far as our record shows here.

Mr. McLaughlin: He has produced it out of his files. That is only one point.

The Court: Well, but it never became a part of the files that were filed in Washington.

Mr. McLaughlin: I want to fix the record on that.

The Court: Oh, yes, certainly; make your record.

Q. By Mr. McLaughlin: Mr. Bircher, that document that you have been identifying has been in the office of the Treasury Department of Los Angeles where you maintain your office, hasn't it? A. Yes.

Q. And it has been one of the files and records of your department here? [374] A. Yes.

Mr. McLaughlin: Now, your Honor, on the question of privilege, an attorney cannot waive privilege, as I understand the law.

The Court: Even if his client is present?

Mr. McLaughlin: Well, that is what I say. Mr. Kissel was present, but not the two Shubins. They were not present when this was delivered.

(Testimony of Donald Oliver Bircher)

The Court: If there was one statement made by one conspirator, it is binding on them all if you find that there was a conspiracy.

Mr. McLaughlin: True, your Honor, if that is sufficient to constitute a waiver of privilege. When we are dealing with an admission which may constitute a conspiracy, that is one thing; but we are dealing with Section 1881 of the Code of Civil Procedure, which specifies and provides that statements between an attorney and client are privileged under the law. And I have ample authorities on that if your Honor cares to hear them. An attorney can't waive that privilege. The only person on earth who can waive it is the individual, and the only one of these individuals that was present at that time was Jack Kissel; and I submit that there is no showing here that the two Shubins ever waived their privilege.

Mr. Strong: May I say, your Honor—

The Court: No. Overruled, exception allowed. Proceed. [375]

Mr. Strong: May I show the document to the jury, your Honor?

The Court: Yes. In evidence.

The Clerk: Government's Exhibit No. 58 in evidence.

(The document referred to and heretofore marked as Government's Exhibit No. 58 was received in evidence.)

[GOVERNMENT'S EXHIBIT NO. 58]

MR. WILLIAM A. SHUBIN

Special Report

HENRY J. RAUSCH

Certified Public Accountant

Tax Counsellor

707 Insurance Exchange Building

Los Angeles

Vandike 9813

July 24, 1945

Mr. William A. Shubin,
3301 East Vernon Avenue,
Los Angeles 11, California.

Dear Sir:

In accordance with instructions received, I have made an investigation of the accounts of Vernon Hotel and Restaurant Supply Company and of the personal bank accounts of the three partners of that company. The purpose of the investigation was to ascertain all partnership income not previously reported on the Federal and State income tax returns for the calendar years 1942, 1943 and 1944.

My investigation did not comprise a complete audit of the accounts and records but consisted of an examination of such accounts, records and related data as I believed would disclose any income not previously reported.

(Government's Exhibit No. 58)

As a result of my investigation, I arrived at a total income of \$245,577.61 which, in my opinion, should have been reported as income for the years 1942, 1943 and 1944

The original returns filed showed income for the year 1943 of	\$41,033.76
and for the year 1944 of	63,418.85

a total of	\$104,452.61
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and unreported income of	\$141,125.00
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The present partnership, which was formed on November 16, 1942, did not file a return for the period from November 16 through December 31, 1942. The original return for 1943, however, included an amount of \$1,581.98 which is attributable to that period.

The unreported income of \$141,125.00 comprises the following items:

Partnership Records

Credits to Partners' Capital Accounts:

William A. Shubin	\$ 4,400.00
Fred A. Shubin	4,400.00
Jack L. Kissel	2,200.00

Total	\$ 11,000.00
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The above amounts were credited to the partners' capital accounts on April 30, 1944, as a transfer from an

(Government's Exhibit No. 58)

account entitled "Additions and Withdrawals from Investment."

An analysis of the latter account showed total credits of

\$40,053.62

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for the period from February 1943 through September 1943 and represent amounts deposited in the bank in excess of the accounts receivable collections and cash sales for that period as shown by the partnership books.

Charges to the account, during the period from March 1943 through April 1944, consisted of the following:

Checks issued to various payees

in payment of meat purchases \$10,166.02

Check issued to William A. Shubin 3,000.00

I am informed that this amount

has been included by W. A.

Shubin with the cash on hand,

as of the date of this exam-

ination, and shown as a sepa-

rate item later in this report.

Transferred to "Cash Account" 3,628.13

This amount was credited to the

cash account on September 30,

1943, and was used to offset a

debit balance in the account as

of that date. It appears that

that amount was taken into in-

come through prior charges to

the account.

Transferred to account entitled

"Operation of Meat Market" 12,259.47

(Government's Exhibit No. 58)

This amount was included in 1943 income and is a part of the \$41,033.76 reported in the original return for that year.

Transferred to Partner's capital accounts as shown above

11,000.00

Total

\$40,053.62

Exchange Account

\$ 5,300.00

The account in the General Ledger entitled "Exchange Account" showed a credit balance, as of the date of my examination, of \$5,300.00. That amount, I am informed, was advanced by W. A. Shubin, from funds not previously reported as income. The account ran from January 1944 through March 1945. The total credits to the account during that period aggregated \$90,480.29. Of this amount, \$25,480.29 represented loans from outsiders. The loans were repaid during the above period and the account was charged with the repayments. The difference, \$65,000.00, represents an accumulation of advances, ranging from \$2,000.00 to \$10,000.00, which, with the exception of \$5,300.00 have been repaid. The "Exchange Account" was used as a revolving fund and the \$65,000.00 represents only the total of the individual advances, none of which exceeded \$10,000.00.

Partners' Withdrawals

\$ 740.00

Withdrawals by Fred A. Shubin \$370.00

and Jack L. Kissel 370.00

\$740.00

(Government's Exhibit No. 58)

during November and December, 1942, were charged to salaries. Because partners' salaries are not deductible for income tax purposes, these charges are reversed.

Other general ledger accounts examined did not disclose any further unreported income.

Partners' Personal Bank Accounts

My examination of the partners' personal bank accounts, made with the assistance of each partner, disclosed the following additional income:

William A. Shubin

All of the deposits from November 22, 1944, to December 31, 1944	\$13,131.77	
Deposits in January 1945	1,122.41	
Total		\$ 14,254.18

William A. Shubin had no personal bank account prior to November 22, 1944.

Fred A. Shubin

1944 Deposits

May 25	\$ 800.00
June 7	510.00
June 13	703.40
July 10	1,000.00
September 5	481.40
September 27	500.00
October 23	500.00

(Government's Exhibit No. 58)

December 5	2,000.00
December 13	520.00
December 14	300.00

 \$ 7,314.80
1945 Deposit

February 7	500.00
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Total	\$ 7,814.80
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Jack L. Kissel1943 Deposit

November 30	\$ 500.00
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1944 Deposits

August 31	\$1,000.00	
October 25	1,500.00	
December 20	1,000.00	
December 21	1,000.00	4,500.00

1945 Deposit

February 1	1,500.00
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Total	\$ 6,500.00
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Other deposits, credited by the bank to the partners' accounts but not listed above, have been accounted for by the partners as consisting of amounts withdrawn from the partnership, personal loans, transfers between partners, etc.

All of the partners' bank accounts were with the Citizens National Trust and Savings Bank, Maywood Branch.

(Government's Exhibit No. 58)

The partners informed me that their wives had no separate bank accounts.

Partners' Cash Expenditures

Personal expenditures by the partners from cash not previously included in income consisted of the following:

William A. Shubin	\$13,750.00
Fred A. Shubin	5,065.00
Jack L. Kissel	2,783.00

Total	\$ 21,598.00
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The above items were given to me by the individual partners during the course of my examination.

<u>Cash on Hand</u>	\$ 11,500.00
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William A. Shubin informed me that, as of the date of my examination, he had cash on hand amounting to \$11,500.00, which should be included in the amount not previously reported.

Other Cash Items

A cash payment of	\$ 28,500.00
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was made on the purchase of the La Vista Apartments.

Cash advanced to California Meat Company during 1944 amounted to	\$ 35,500.00
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Total of all items	\$142,706.98
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Less: Amount attributable to 1942 income and included in the 1943 return	1,581.98
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Amount of Unreported Income	\$141,125.00
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(Government's Exhibit No. 58)

The foregoing will supplement my letter to Messrs. Brady and Nossaman, under date of June 27, 1945.

In the letter referred to above, the dates of April 25 and April 28, on page one, should be changed to read May 25 and May 28, respectively; and April 28 on page two should be changed to May 28.

Respectfully yours,

Henry J. Rausch

Case No. 18367 Cr. Gov. Exhibit. Date 6/20/46. No. 58 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

Q. By Mr. Strong: This report was furnished to you, I understand, pursuant to a prior request by you for it? A. Yes; that is correct.

Q. And when was that request made?

A. On July 24th, when the two Shubin boys went into our office and made a statement. I told them that we would check into their statements and verify their returns and representations as to their income from various sources, and we would want to make an audit of their books and records, and we would also want to check over their audit of their accountant, and that I wanted to see some record which would show the basis for the amended returns that were filed. We wanted to see how they were computed.

(Testimony of Donald Oliver Bircher)

Q. And did the defendants present at that meeting agree to have prepared for you a report by one of their accountants?

Mr. McLaughlin: Objected to as calling for a conclusion.

Q. By Mr. Strong: Will you state what they said in that connection in answer to your request? [376]

A. They said we could have anything we wanted; they would cooperate fully and let us have whatever we wanted to verify the returns that had been filed, to verify their statements.

Q. As I understand, you were interested at that time in the difference between the income originally reported by Vernon Hotel & Restaurant Supply Company for the years 1942, 1943, and 1944, and the amount reported on the amended returns? A. That is correct.

Q. And was this request that you made in connection with that difference? A. Yes.

Q. And this report was then submitted to you, Government's Exhibit 58? A. Yes.

Q. In explanation of that? A. That is right.

Q. Did you on July 24, 1945, during this conference also have occasion to question the defendant Frederick Shubin? A. Yes.

Q. And was that in the presence of the same parties that you testified to before?

A. That is correct.

Q. Was anything said to Frederick Shubin—

The Court: I believe he said that the Frederick Shubin [377] conference was in the afternoon.

Q. By Mr. Strong: Will you state the names of the persons who were present?

(Testimony of Donald Oliver Bircher)

The Court: Is that right?

The Witness: That is correct, your Honor.

The Court: And William was in the morning?

The Witness: That is correct.

The Court: If this is a different conference, you had better lay a foundation.

Mr. Strong: Q. Will you state at what time you examined the defendant Frederick Shubin on July 24, 1945? A. That was the afternoon and—

Q. And where was it?

A. In our office concerence room on this eighth floor, Internal Revenue Office in this building.

Q. Will you state who was present?

A. Attorneys Joseph D. Brady and Stanley Anderson, and Frederick Shubin and Special Agent Phoebus, I believe. Miss Dudney, one of our stenographers, and myself.

Q. Was anything said by you to Frederick Shubin concerning the use of the information obtained during that conference?

A. Yes. I told him that he was not required to give any statement or to answer any questions that he felt might tend to incriminate him, and that any statements he made or any documents produced at that meeting might be used by the [378] Government in any subsequent proceeding. I asked him if he understood that, or if he wished his attorneys present to advise him further in that regard; and there was some discussion, and then he stated he was willing to make a voluntary sworn statement and answer all questions.

(Testimony of Donald Oliver Bircher)

Q. Discussion between whom?

A. There was some discussion between Frederick Shubin and his attorneys, and after that discussion he said that he would voluntarily answer any questions.

Q. Now, will you relate what questions you asked the defendant Frederick Shubin and what answers you got during that conference in connection with the income and source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

Mr. McLaughlin: Before that question is answered, may I ask the witness a few questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, when did you last read the written statement of Frederick Shubin?

A. I glanced at it this noon, but I don't think I have read it completely for many months.

Q. When you say you glanced at it do you mean that you looked at and read the front sheet, and then passed over, or did you turn the pages and look at several pages?

A. I looked at several different pages, but I was [379] hungry and I didn't take time to read them all in detail.

Q. You did not read it entirely through?

A. That is correct.

Q. Were you conferring with Mr. Strong this noon about the contents? A. No; I have not.

Q. Before you came to court this morning did you look at the statement of Frederick Shubin?

A. Yes; I reviewed them all last night casually.

Q. Well, when you say "casually" do you mean you read them or you did not?

A. I read portions of them, maybe turning the first page and then jumping to the fifth page, just kind of to

(Testimony of Donald Oliver Bircher)

refresh my memory a little bit. I didn't read them thoroughly.

Q. That was last evening? A. That is correct.

Q. Prior to last evening, how long was it since you read them?

A. Probably four or five days or a week that I casually looked them over. I haven't looked them over thoroughly for many months.

Q. Well, ever since this proceeding has been going on you have been refreshing your recollection or looking at them from time to time, haven't you? [380]

A. Yes.

Q. To keep your memory refreshed? Now, are you able to state today what things Frederick Shubin said to you, without recalling what you have read at these times from the statements?

Mr. Strong: I object to that, your Honor.

The Court: Oh, I will permit it to be answered.

A. Yes; I can state in substance what was said without refreshing my memory. I know what was said.

Q. By Mr. McLaughlin: Could you have done that before you read it last night? A. Yes.

Q. You could? A. Yes.

The Court: Proceed, gentlemen.

Mr. McLaughlin: Before he proceeds, I want to make the objection so I won't be interrupting, to his testimony regarding the discussions with Mr. Shubin on the ground that he is testifying from documents and from conversations that were given in the course of his official duties as a Collector of Internal Revenue at the time that the defendant Frederick Shubin was performing his official duties and giving information that was confidential, and

(Testimony of Donald Oliver Bircher)

his testimony is in effect testimony as to the contents of documents which he has seen and read constantly since the time it was taken. [381]

Mr. Strong: I am going to state, your Honor, that there is nothing here and nothing that I know of in the law which makes the testimony of Frederick Shubin confidential. He gave it voluntarily to these people in support of his own claim in connection with his own income tax returns. He was trying to justify certain things he did.

The Court: Overruled and exception. Proceed.

Q. By Mr. Strong: Will you proceed to relate the questions you asked and the answers that were given to you by the defendant Frederick Shubin on this occasion with reference to the income and the source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

A. I asked Frederick Shubin whether it was true that his firm had received approximately \$141,125 in overcharges during the period November 16, 1942, to December 31, 1944, as indicated by the reports of their certified Public Accountant, Henry Rausch. And he said that that was true.

I asked him how those sums were collected and he said those overcharges were usually collected in cash, and that usually the regular charges, invoice charges, were paid by checks by the customers. He said that occasionally he collected those overcharges and occasionally Jack Kissel collected them, but usually William Shubin collected them; and that when he collected the overcharges or when Jack Kissel collected the overcharges, that they would turn over [382] that cash to William Shubin who maintained that cash fund at home.

(Testimony of Donald Oliver Bircher)

He said that the fact that they were collecting overcharges was not made known to their employees in their office, nor to their bookkeeper whom they had failed—their first bookkeeper whom they had failed to advise of their collection of these overcharges, because they did not want people to know they were in the black market; but that finally they made a full disclosure of those receipts and that income to Mr. Rausch, Certified Public Accountant, who had filed corrected amended returns on July 2nd, 1945.

He stated that he and his two partners were to share equally in the profits of the business as well as in the profits of the overcharges.

He stated that the employees of the company did not know they were collecting overcharges, nor did their respective wives.

He stated that the reason that they did not want those overcharges recorded on their books was because they were conscious of the fact that the OPA rules permitted some treble damage recovery based on any overcharges.

And he stated that he had consulted with Mr. del Valle, his attorney, who had advised reporting the additional overcharges on the tax returns, and that he had proposed that maybe they could be reported as gambling games or poker [383] games or horse racing games; and that Mr. del Valle did not approve of that and suggested getting outside counsel or getting some additional advice on reporting it.

He stated that at all times he had wanted to pay his income taxes, that is, that the company had wanted to report all their profits, but they didn't know how to with-

(Testimony of Donald Oliver Bircher)

out putting themselves liable to revocation of their license as wholesalers, meat wholesalers.

That is about all that I can recall.

Q. Was anything asked about the purchases of meat by the Vernon Hotel & Restaurant Supply Company?

A. Yes. I asked them if the company overpaid when they purchased meat ;and he said, "No," they wouldn't do that; all their purchases were strictly in accordance with OPA ceiling prices.

And he said that the reason that they didn't have to overpay was because many of the meat packers had to bone meat for the Government and that the packers didn't like that duty, and that therefore they were able to obtain a certain allotment from packers by doing their boning for them; for that reason they could obtain a supply of meat without overpaying.

Q. Was anything said about where the money received from overcharges was kept?

A. I asked Frederick Shubin where the money was kept [384] and he said that he didn't know. And I asked him that two or three times, and at one time he said he thought William Shubin, his brother, kept it at home.

Q. Was anything asked about how overcharges were determined upon?

Mr. McLaughlin: Objected to as leading.

The Court: That does not suggest the answer. The witness might say "No." I will permit him to answer.

A. He said that he sometimes collected overcharges. I believe he said that the most he ever remembered collecting was two cents a pound and the total overcharge collected at one time was \$100.00.

(Testimony of Donald Oliver Bircher)

Q. By Mr. Strong: Was anything said about whether the overcharges were collected by check or cash?

A. He said nearly always in cash; he didn't ever remember of getting a check.

Q. On August 1, 1945, directing your attention to that date, did you have a conference on that date with the defendant Jack L. Kissel? A. I did.

Q. Will you please state at what time the conference was held, where it was held, and who was present?

A. On August 1, 1945, Attorneys Joseph Brady and Stanley Anderson brought their client, Jack Kissel, to our office on the eighth floor in this building and in a confer- [385] ence room they held a conference with Mr. Jack L. Kissel.

The Court: What was that date?

The Witness: On August 1, 1945.

The Court: All right.

Q. By Mr. Strong: Was anything said at that time about the possible use of the statements made by the defendant Kissel in subsequent proceedings?

A. Yes. I told him that he was not required to incriminate himself, and that any statements he might make or any documents produced might be used by the Government in any subsequent proceedings. And I asked him if he wished to have his attorneys explain that to him more in detail, and he stated that he did, and then there was a discussion off the record where his attorneys advised him, and then he stated that he was willing to give a voluntary sworn statement and we proceeded to take his answers.

(Testimony of Donald Oliver Bircher)

Q. Did you hear his attorneys advise him?

A. His attorneys advised him that any statements he made might be used by the Government in any subsequent proceedings and that he was not required to incriminate himself, and that he had the right to refuse to answer any questions that he felt might tend to incriminate him.

Q. Was this the same conference at which Government's Exhibit 57 was received, that audit report?

A. Yes; on August the 1st, 1945. [386]

Q. Do you recall what questions you asked the defendant Jack L. Kissel on that occasion and what answers you received concerning the income and the source of income on the income tax returns of the Vernon Hotel & Restaurant Supply Company?

Mr. McLaughlin: Now, your Honor, before that question is asked, may I ask the witness the same questions?

The Court: Yes.

Q. By Mr. McLaughlin: Mr. Bircher, at that time there was transcribed a statement of the questions and answers, was there not?

A. That is correct.

Q. And you have that statement? A. Yes.

Q. And did you look at it this noon?

A. Yes, casually. I mean I didn't read it fully.

Q. Well, how long did you spend looking at it?

A. Probably three minutes to five minutes.

Q. Did you look at it before you came to court this morning?

A. Yes; last night.

Q. Did you read it through last night?

A. No. I haven't read it through, I don't think, in months.

Q. Well, how many months? [387]

A. Well, it is about eight months, I guess.

(Testimony of Donald Oliver Bircher)

Q. You did read it through eight months ago?

A. That is correct.

Q. And that was how long after it was given? It was given in August. How long after it was given did you read it?—Withdraw that. Was there an interval of time after you got that statement between this time that you say you read it through eight months ago?

A. That is correct.

Q. How long an interval?

A. About three months.

Q. And you read it through carefully then?

A. Yes, sir.

Q. And that was before you gave any testimony or information to anyone regarding this case?

A. I am not certain about that. We received the Commissioner's letter of authority, it was dated October 10, 1945, and I don't remember whether—I know that I didn't have any conference with Mr. Strong before that date.

Q. And it was about that time that you did read it through carefully, and you also read through the other two statements that we have referred to, that is Mr. Shubin, the two Mr. Shubins?

A. Yes; about a month after that date, for the purpose of writing my report in the income tax case. [388]

Q. A month after when?

A. Well, probably in November, 1945.

Q. You read it then? A. That is correct.

Q. And you had read it before in October?

A. No. I was not interested in it in October.

Q. Then, it was after this time that you made your report of the income tax. Did you also read it after you

(Testimony of Donald Oliver Bircher)

received the letter from the Commissioner of Internal Revenue? A. Yes; that is right.

Q. The reason that you read it, the reason that you looked at the statement on this occasion and the reason that you looked it over last night was to refresh your recollection, wasn't it? A. Yes.

Mr. McLaughlin: That is all the questions I have. And, if your Honor please, I wish to object, stating the same grounds as stated, as the basis of the objection to the testimony regarding the other two discussions, that is, with the two Mr. Shubins; and I wish to have it stipulated that my objection goes to all these questions and answers so that I won't have to object every time.

The Court: It will be so understood. Overruled. Proceed.

Q. By Mr. Strong. I just want to ask you one question [389] about these statements. When did you first read these statements, the first time?

A. Probably the day after they were transcribed.

Q. And that was how soon after the conference in each case? A. Within two or three days.

Q. And at that time did you read the entire statements? A. Yes.

Q. And at that time did you have a clear recollection of the questions that you had asked and the answers that you had gotten? A. Yes.

Q. Was there anything in these statements that you found to be at variance with the questions and answers as you recalled them at that time?

A. No, except that in connection with one of the statements there were some changes made.

(Testimony of Donald Oliver Bircher)

Q. By whom?

A. In connection with the statement taken from Frederick Shubin.

Q. Who made the changes?

A. He did, he and his attorneys, when they came together to sign the statement they wanted certain portions deleted, and I told them that they could delete what they wanted to and give us what they wanted to; it was their option to furnish us what they wanted to, and if they wanted [390] to give us a sworn, signed statement, voluntary statement, they could do so and present to us whatever representations they cared to. [391]

Q. Now, will you state what questions you asked and disclose, as nearly as you can recall, what was said to you in answer by the defendant Jack L. Kissel at this conference which you have described on August 1, 1945, with reference to the income and the source of the income on the income tax returns of the Vernon Hotel and Restaurant Supply Company?

A. I asked Mr. Kissel the source of the \$141,000 that had been added to the income tax returns of the Vernon Hotel and Restaurant Supply Company, that is, that sum in addition to the amounts of the income originally reported by that partnership for that period November 16, 1942, to December 31, 1944.

He said that that sum represented black market profits or overcharges collected, sums collected in excess of OPA ceiling prices by himself and his two partners.

He stated that they had had a certified public accountant, Mr. Rausch, make an audit of their records and that all information had been given to this accountant regarding the personal investments and expenditures for his

(Testimony of Donald Oliver Bircher)

information in preparing his audit; and that that sum represented those excess charges that had been collected but which had not been recorded, for the most part, on the books and records of the company.

He said that in a few instances he had helped his partners to prepare fictitious invoices when they wanted to [392] plug in some of that money into the business and into their receipts, when the company needed additional funds.

He said that at all times they had wanted to pay their income taxes on their entire income, but that they were afraid they would lose their license if they showed those excess charges that had been collected.

He said that he and both of his partners had collected these excess charges on occasions. Whenever he would collect them would be when Bill Shubin was in conference or on an occasion similar to that.

He said that he was in general charge of the plant and that he allocated the meat to the different dealers. He said that the overcharges were not collected from everyone impartially; they collected different sums from different ones, that is, overcharges. Usually the overcharges were collected in cash and that such overcharges were kept by Bill Shubin at his home.

He said that on one occasion he needed some money and he asked Bill where the money was kept and Bill told him it was home in a drawer; and that he went to Bill's home and searched for half an hour or so for it, for that

(Testimony of Donald Oliver Bircher)

amount, and could not find the fund. He said that he was sometimes worried because he didn't know where Bill Shubin kept this fund of overcharges, because he didn't know what would happen in case he died. And he said that both he and Frederick Shubin [393] fully trusted Bill Shubin to keep the money together and make a fair distribution to them all.

That is about all I can remember.

Q. At this conference of August 1, 1945, and at the two conferences on July 24, 1945, was anything said about the investigation being continued by the Internal Revenue Bureau after those meetings?

A. Yes. I told them that we would want to make an audit of their records, go out and check their records and verify their income. They assured us of their continued cooperation to make everything available. [394]

Q. And did you subsequent to those two dates, July 24, 1945, and August 1, 1945, conduct an audit or assign anyone else to conduct an examination and audit of the books of the Vernon Hotel and Restaurant Supply Company?

A. I can say this, that Special Agent Phoebus was working with me or under me and he continued the assignment in cooperation with Internal Revenue Agent Eustice who was assigned from the Internal Revenue office to carry on.

Q. Is that the agent Eustice who testified here today?

A. Yes, that is correct.

(Testimony of Donald Oliver Bircher)

Q. And did you from time to time thereafter or did you at any time thereafter have any conferences with Mr. Eustice concerning the accounts and the books of the Vernon Hotel and Restaurant Supply Company as his investigation progressed?

A. Yes. I kept in touch with the two men that were out there making the audit.

Q. Was there any discussion at any one of these three meetings with any one or all of the defendants as to whether the defendants had discussed this entire matter of overcharges?

Mr. McLaughlin: Just a moment. With whom?

Mr. Strong: Among themselves.

Mr. McLaughlin: It is objected to as leading.

The Court: The question does not suggest the answer. He could say no or yes. You may answer. [395]

The Witness: Yes.

Q. By Mr. Strong: Will you state at what meeting such a discussion was held and with whom?

A. I asked each of the three partners whether they kept track of how much the overcharges were amounting to at different periods and they said they did, and Bill Shubin said that occasionally the men would ask him, his two partners, how much the fund amounted to. He said sometimes he would tell them that they would have to wait until he could count it and that he would advise them after he had counted it.

(Testimony of Donald Oliver Bircher)

Each of them said that they were to share equally in the fund, in the profits of the business, both the regular income and the overcharges.

Mr. Strong: That is all.

Mr. McLaughlin: No questions.

The Court: That is all.

(Witness excused.)

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss this matter among yourselves nor permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this controversy until it is finally submitted to you under the instructions of the court. We will take a recess. [396]

(Short recess.)

The Court: Stipulate that the jury are present, gentlemen?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

The Court: Stipulate that the defendants are in court?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Proceed.

Mr. Neukom: May it please your Honor, the government has seen fit not to produce evidence as to certain courts, and I would like for the purpose of the record

and since we have not produced such evidence it is obvious that the court will dismiss those counts. They are as follows, your Honor. Count 12, 13, 14, 15, 19, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, and 40.

In checking the evidence your Honor, I feel that we have produced evidence on all of the other remaining counts that I did not name at this time, your Honor.

The Court: No objection?

Mr. McLaughlin: No objection, your Honor.

The Court: The motion of the government to dismiss counts 12, 13, 14, 15, 19, 26, 27, 28, 29, 34, 35, 36, 37, 38, 39, and 40 will be granted.

Mr. Strong: At this time, your Honor, I think there are [397] some documents which were marked for identification which have not been introduced in evidence. I would like to offer in evidence Government's Exhibits 1 and 2 which are the bank records.

Mr. McLaughlin: We object on the ground that they are immaterial.

The Court: In evidence.

The Clerk: Government's Exhibits 1 and 2 received in evidence.

(The documents referred to were received in evidence and marked Government's Exhibits 1 and 2.)

[GOVERNMENT'S EXHIBIT NO. 1]

SUBJECT: Mr. A. or Julia T.

No. 436

SURNAME FIRST

SIGNATURE OF CUSTOMER

SIGNATURE OF CUSTOMER

SHEET No

CURRENT DATA FROM OLD CARD

MINIMUM QUARTERLY BALANCES

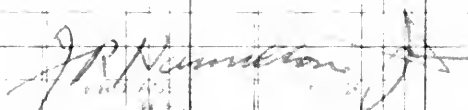
1ST OR 3RD \$ 2ND OR 4TH \$

NUMBER OF WITHDRAWALS

(ACCT. TRANSFERRED FROM
BRANCH No ACCT No

DATE	INTEREST	WITHDRAWAL	DEPOSIT	BALANCE
BROUGHT FORWARD				
12/23/43			140.00	140.00
2/14/44			30.00	190.00
5/25/44			150.00	340.00
Int. Pmt. 80				
6/30/44	.32	Compared		340.32
7/26/44			100.00	440.32
9/14/44			100.00	540.32
Int. Pmt. 81				
12/31/44	1.70			542.02
1/18/45		Compared	200.00	742.02
2/9/45			50.00	792.02
5/8/45			100.00	892.02
5/24/45			50.00	942.02
Int. Pmt. 82				
6/30/45	3.33			945.35
6/28/45			50.00	995.35
9/11/45			100.00	1095.35
10/2/45			50.00	1145.35
11/14/45			50.00	1195.35
Int. Pmt. 83				
12/31/45	8.21			1200.56
1/3/46		1200.56		

Declared a true copy of Banks record.

Bank of America N. Y. & C. A.
Bell Branch.


Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/18/46. No. 1 Identification. Date 6/20/46. No. 1 in Evidence. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

[GOVERNMENT'S EXHIBIT NO. 2]

SHEETS: A. A. or J. F.

No. 2179

SURNAME FIRST

"Declared a true copy of Banks record"

SIGNATURE OF CUSTOMER

Bank of America N. A. & S. A.
Bell Branch.

SIGNATURE OF CUSTOMER

110 Assistant Cashier

SHEET No.

(Chief Clerk)

CURRENT DATA FROM OLD CARD

MINIMUM QUARTERLY BALANCES

1ST OR
3RD \$2ND OR
4TH \$

NUMBER OF WITHDRAWALS

(ACCT. TRANSFERRED FROM
BRANCH No. ACCT. No.

DATE	INTEREST	WITHDRAWAL	DEPOSIT	BALANCE
BOUGHT FORWARD				\$48.02
12/17/41		10.00		\$38.02
Int. 1.76				
12/31/41	.61			\$38.63
2/27/41		226.00		\$16.63
1/12/42			100.00	\$116.63
1/5/42			10.00	\$126.63
2/18/42	Compared		25.00	\$151.63
3/23/42		35.00		\$116.63
3/25/42		15.00		\$101.63
4/10/42			30.00	\$131.63
4/15/42		209.87		\$11.76
4/23/42			10.00	\$21.76
5/1/42			18.24	\$39.00
5/7/42			25.00	\$64.00
5/13/42			10.00	\$74.00
5/20/42			22.00	\$96.00
5/29/42			17.00	\$113.00
6/2/42			10.00	\$123.00
6/15/42			30.00	\$153.00
Int. 1.76				
6/30/42	1.76			\$154.76
6/22/42	Compared		35.00	\$189.76
7/2/42			30.00	\$219.76
7/9/42			3.24	\$223.00
7/17/42			21.00	\$244.00
7/23/42			10.00	\$254.00
8/10/42			15.00	\$269.00
8/12/42			5.00	\$274.00
8/3/42			20.00	\$294.00
8/8/42			7.00	\$301.00
8/23/42			20.00	\$321.00
10/1/42			3.00	\$324.00
10/6/42			2.00	\$326.00
10/16/42			10.00	\$336.00
10/31/42			10.00	\$346.00
FORWARD				BALANCE FORWARD

(Government's Exhibit No. 2)

SHUBIN: W. A. or J. T.

No. 2179

SURNAME FIRST

SHEET No. _____

DATE	INTEREST	WITHDRAWAL	DEPOSIT	BALANCE
BROUGHT FORWARD				545.00
11/4/42			10.00	555.00
12/3/42			100.00	655.00
Int. Pmt. 77 12/31/42	2.84	Compared		657.84
12/30/42			20.00	677.84
1/5/43				
1/19/43			110.00	787.84
1/28/43			14.16	801.99
2/4/43			10.00	811.99
2/17/43			35.00	846.99
2/24/43			10.00	856.99
3/25/43			20.00	876.99
4/2/43			20.00	896.99
4/8/43			10.00	906.99
4/13/43			20.00	926.99
4/16/43			10.00	936.99
4/22/43			10.00	946.99
Int. Pmt. 78 5/30/43	5.49			952.48
7/15/43			10.00	962.48
7/26/43			80.51	1042.99
9/10/43			40.00	1082.99
10/16/43			55.00	1137.99
10/2/43			130.00	1267.99
11/3/43			20.00	1287.99
11/24/43			36.00	1323.99
Int. Pmt. 79 12/31/43	5.89	Compared		1329.88
1/13/44			20.00	1349.88
1/21/44			20.00	1369.88
2/14/44		1600.00		1769.88
2/17/44			100.00	1869.88
8/1/44			450.00	2319.88
9/14/44			100.00	2419.88
10/16/44			2127.85	4547.73
Int. Pmt. 81 12/31/44	11.74			4559.47
3/19/45		520.00		4039.47
Int. Pmt. 82 5/30/45	8.46			4047.93
9/11/45		470.00		3577.93
Int. Pmt. 83 12/31/45	0.10			3578.03
1/3/46			240.00	3338.03
1/3/46		1300.00		2038.03

Case No. 18-264a
vs. *Attorney*
EXHIBIT
Date 6/14/44 No. 2
Date 6/20/44 No. 2
Clerk, U. S. District Court, Sou. Dist. of Calif.
Deputy Clerk
6-2452

Mr. Strong: Government's Exhibit 23 which also are bank records.

The Court: Subject to the same objection, in evidence.

The Clerk: Government Exhibit 23 admitted into evidence.

(The documents referred to were received in evidence and marked Government's Exhibit No. 23.)

Mr. Strong: Then I would like to offer in evidence these certified income tax returns.

The Court: For the partnership?

Mr. Strong: First the partnership, yes. They are exhibits 46, 47, 48 and 49.

Mr. McLaughlin: To which we object on the ground that they are immaterial and not probative of any issues in this case and were not obtained pursuant to the laws and regula- [398] tions with respect to such returns.

The Court: Admitted in evidence.

The Clerk: Government's Exhibits 46, 47, 48 and 49 admitted into evidence.

(The documents referred to were received in evidence and marked Government's Exhibits 46, 47, 48 and 49.)

Mr. Strong: At this time I would like to offer in evidence certified copies of the individual income tax returns Nos. 35 to 45 inclusive.

Mr. McLaughlin: We object to those on the ground that they are immaterial and not probative of any issue in this case and that they were not obtained pursuant to the laws and regulations relating to obtaining of such documents and that they are privileged.

Mr. Strong: Your Honor, these documents are neither privileged nor were they obtained not in pursuance to law. They were obviously obtained pursuant to the provisions of law, otherwise they would not have been issued. They are issued and certified copies and under the provisions of Section 661 of Chapter 17, Title 28 U. S. Code, they are admissible in evidence.

The Court: No, I don't believe they were secured in accordance with the statute of regulations, the individual returns. The motion of the defense will be sustained.

Mr. Strong: The government rests. [399]

The Court: Does the defense wish to make an opening statement, Mr. McLaughlin?

Mr. McLaughlin: Your Honor, I would like to make some motions and I am not going to take up any time arguing them either at this time, but I would like to have five or 10 minutes to make them.

The Court: Yes. Approach the bench. Do you want to make them in the absence of the jury or at the bench?

Mr. McLaughlin: I think I would rather make them in the absence of the jury.

The Court: You may approach the bench.

Mr. McLaughlin: Your Honor, in other words I would prefer to make the motions so that my clients can hear me. In other words, I am representing them that I feel that they should know what is happening on this particular matter.

The Court: Ladies and gentlemen of the jury, you will remember the admonition I have heretofore given you. You will not discuss this matter among yourselves nor permit anyone to discuss it in your presence. You will not express or form any opinion as to the merits of this con-

troversy until it is finally submitted to you under the instructions of the court.

If you will retire now to the jury room I will call you as soon as the lawyers are finished. It will be just a few minutes. [400]

A Juror: Your Honor, will it be permissible to take this with me?

The Court: I think not because you are not really in session.

(Thereupon, the jury retired from the court room and the following proceedings were had:)

Mr. McLaughlin: May I proceed, your Honor?

The Court: Yes.

Mr. McLaughlin: Your Honor, the first motion I wish to make is a motion to strike all the testimony that was given by Mr. Bircher and the testimony which was given by Mr. Phoebus, and the testimony that was given by the other agent for the Department of Internal Revenue, Mr. Eustice, and the grounds upon which said motion is premised is that the information that those witnesses obtained was obtained in the course of their duty in connection with securing information from these defendants which the defendants gave pursuant or in connection with their income tax returns and that it is a violation of the rule against search and seizure to permit them to testify to such matters, and on the further ground that the evidence shows that those witnesses used documents which are not admissible in evidence to refresh their recollection and that therefore their testimony should be stricken. That is the first motion, your Honor.

The Court: Denied and exception allowed. [401]

Mr. McLaughlin: Now, the next motion that I wish to make, your Honor, I have some motions for judgments of acquittal pursuant to the new rule which I think states that a motion for judgment or acquittal is the proper way to raise these. That is Rule 29, subsection A.

The Court: That is right.

Mr. McLaughlin: The first motion that I wish to make is a motion for judgment of acquittal in behalf of the defendant Frederick Shubin as to all counts in the indictment with the exception of count 1 and the grounds of that motion are that there is no evidence which connects Frederick Shubin up with any of the allegations or any of the charges set forth in any of those counts which remain in the indictment that haven't already been dismissed.

There has been no testimony of any witness of any specific overcharge or any specific transaction with respect to Frederick Shubin and the only testimony that has been given with respect to that at all was the testimony of Mr. Bircher which was the testimony that at most, if it has any value, would go to prove count 1 because it was general testimony that he knew about overcharges that the firm was making.

The Court: Motion will be denied and exception allowed.

Mr. McLaughlin: The next motion which I wish to make, your Honor, is a like motion in behalf of Frederick Shubin as to count 1 and the grounds on which that motion is made is [402] that there is no evidence of any conspiracy and no evidence of any overt act on the part of Frederick Shubin as charged in count 1.

The Court: The motion will be denied and exception allowed the defendant.

Mr. McLaughlin: I wish to make a like motion on behalf of William Shubin as to count 1, your Honor.

The Court: The motion will be denied and exception allowed the defendant.

Mr. McLaughlin: I wish to make a like motion on the same grounds as the preceding motions as to Jack Kissel as to count 1.

The Court: The motion will be denied and exception allowed.

Mr. McLaughlin: Now, your Honor, in addition to the counts which counsel have voluntarily dismissed, I wish to make a motion to dismiss certain other counts and I think they might verify the fact. I believe they overlooked some of those that they put in no invoices on according to my records.

The first count that there is no evidence in support of, no invoice or anything, is count 10. This relates to a Mr. Snider and the invoice number is 47443. I am quite sure there is no exhibit, your Honor, in on that.

Mr. Strong: Exhibit 34. [403]

The Court: Yes, I have that in my notes.

Mr. McLaughlin: That is Exhibit 34?

Mr. Strong: Government's Exhibit 34.

Mr. McLaughlin: All right. The next one is count——

The Court: Let me make a record of that. The motion is denied.

Mr. McLaughlin: The next one is count 23. That is also Snider.

Mr. Strong: Government's Exhibit 32.

The Court: Exhibit 32. I have it in my notes. The motion will be denied.

Mr. McLaughlin: The next one is count 25.

The Court: Government's Exhibit 33.

Mr. Strong: Yes, your Honor.

The Court: I have it in my records. The motion will be denied.

Any others, Mr. McLaughlin?

Mr. McLaughlin: Yes, your Honor. Counts 20 and 21. They are Emil Dvorak.

Mr. Strong: Exhibit 16 for count 20 and Exhibit 17 for count 21.

Mr. McLaughlin: Which one is for count 21?

Mr. Strong: Exhibit 17.

Mr. Neukom: Those tally, your Honor.

The Court: Miss Bennallack, read that to me, those ex- [404] hibit numbers.

(Record read.)

The Court: Exhibit 16 is for count 20, Exhibit 17 for count 21, and Exhibit 18 for count 22.

Mr. Strong: That is right, your Honor.

The Court: The motion will be denied.

Mr. McLaughlin: Your Honor, I wish to make a motion for a judgment of acquittal as to all counts involving Emil Dvorak as to all three defendants, and the grounds of that motion are that there is no evidence that the defendants, or any of them, ever caused or required or requested Emil Dvorak to pay any overcharges.

He was asked that question and he pointblank said that they never did make any such request or requirement, and those counts are 2, 3, 4, 5, 6, 7, 8, 9, 16, 17, 18, 20, 21, 22, and that is all of the Dvorak counts.

The Court: But he testified that he did pay the overcharges. Overruled. Denied.

Mr. McLaughlin: Your Honor, I now want to repeat my motion in behalf of all the defendants for a judgment of acquittal as to all of these counts on the ground that the government has failed to prove that the regulations or any of the regulations involved in this case have been duly promulgated and alleged in the indictment, and on the further ground that they have failed to prove knowledge of the [405] terms and provisions of those regulations which they claim were violated, and I will submit that now.

At some time during the trial I would like to cite some authorities on that.

The Court: You can hand them to the court and I will read them while I am hearing the case, Mr. McLaughlin. The motion will be denied and exception allowed the defendants.

Mr. McLaughlin: Your Honor, that is all the motions that I have.

The Court: All right, call the jury.

Mr. McLaughlin: Before the jury is called, your Honor, may I bring up one other matter?

The Court: Yes.

Mr. McLaughlin: I understand that Mr. Phoebus and Mr. Schlick are under subpoena by the government. They are the two Internal Revenue Agents, and with that understanding I haven't subpoenaed them, and I understand that they are in the building. I asked Mr. Strong if they are under subpoena and he stated that they were under subpoena by the government but that I could not call them, and I would like to have a clarification on that be-

cause I want to call these two gentlemen and ask them a question regarding this investigation that they made.

Mr. Strong: Well, if your Honor please, all I stated was that their authority extended no further than the authority [406] for the government and that furthermore the authority only extends to their testifying as witnesses for the government, and I don't know that they have authority under the law. I wouldn't want to put them in the position of committing a misdemeanor by testifying without having been duly authorized by the Commissioner.

That is the point raised by counsel with some success as to some testimony, and the authority says, "You are hereby authorized to cooperate with Charles H. Carr and to furnish any pertinent documents and appear in response to subpoena in any proceedings as witnesses for the government."

Now, there is a provision in the regulations whereby other parties besides the government can procure the testimony of these agents and that again requires writing letters as counsel pointed out I had to do in getting the various authority for them to come here. Had I called these people as witnesses and questioned them, there would not be any doubt as to counsel's right to cross examine as to matters, but if he is going to call them as his own witnesses I think he can only do so pursuant to specific authority as provided by law.

The Court: Oh, I don't believe so. I believe when a witness is called by either side—it certainly would shock the conscience of the court if a witness could be called by either side and then say to the other side, "While we admit [407] you can cross examine fully on the questions

we brought out, you can't ask any other questions and you can't call them as your own witness."

Mr. Strong: I didn't mean to leave that impression, your Honor. They were not called by the government at all.

Mr. McLaughlin: Mr. Phoebus was on the stand.

Mr. Strong: And they only testified as to the Vernon Hotel and Restaurant Supply Company, not as to the individuals. Of course he can be questioned as to anything that he has authority to testify about. I am just talking about——

The Court: I don't think the government has a right to say to one of its representatives, "Now, you can only testify favorably to the government. You can't go on the stand and testify against the government." That would shock the conscience of the court.

Mr. Strong: I am not trying to say that, your Honor, but that just possibly there is some question as to their authority under the law in connection with testifying in respect to other matters asked by counsel, since your Honor has ruled that our authority was strictly limited to certain lines. Aside from that I am not raising any question.

The Court: I am just directing my remarks to the witness who testified.

Mr. Strong: Yes.

The Court: And I am in great doubt about any other [408] government witness who is protected by the statute that the defense have so strenuously urged here and with which I have agreed in part.

Mr. Strong: I didn't mean to object to their calling a witness who has testified. I only intended to refer to those who haven't been called.

The Court: All right.

Mr. McLaughlin: May I ask if Mr. Phoebus or Mr. Schlick are in the court room at this time? Mr. Phoebus?

Mr. Phoebus: Yes, sir.

Mr. McLaughlin: And Mr. Schlick?

Mr. Schlick: Yes, sir.

Mr. McLaughlin: Thank you. I have no other comment, your Honor.

The Court: Mr. Phoebus did testify but Mr. Schlick did not.

Mr. McLaughlin: That is right.

The Court: Well, you remain in the court room, Mr. Schlick, and I will permit you to be put on the stand until I see how far the examination goes and at that time I will make a ruling.

Call the jury. Let the record show that all the matters have been without the presence of the jury.

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated. [409]

(Thereupon, the jury returned to the court room and the following proceedings were resumed in their presence:)

The Court: Stipulate that the jury are present, gentlemen?

Mr. Strong: So stipulated.

Mr. McLaughlin: So stipulated.

The Court: Mr. McLaughlin, did you wish to make an opening statement?

Mr. McLaughlin: I will call Mr. Phoebus.

The Court: Stipulate that the defendants are in court?

Mr. McLaughlin: So stipulated.

Mr. Strong: So stipulated.

SAMUEL J. PHOEBUS

called as a witness on behalf of the defendants, being previously duly sworn, was examined and testified as follows:

The Court: Mr. Phoebus, you have been sworn?

The Witness: Yes, sir.

Direct Examination

By Mr. McLaughlin:

Q. Mr. Phoebus, you have already been sworn in this case and testified, I believe, that you knew the defendants William Shubin, Frederick Shubin, and Jack Kissel?

A. Yes, sir.

Q. Did you have any discussion with either of them or any of them regarding the use or the disclosure of what they [410] told you to anyone else? A. Yes.

Q. Will you state when you had that discussion?

A. At the time that Mr. Eustice, the Internal Revenue Agent, and I were at their place of business making the audit.

Q. Now, can you fix that? It was in August of 1945 I presume but can you fix the approximate time in August, Mr. Phoebus?

A. Well, I would not presume it was in August.

Q. I see.

A. It occurred at some time during the two and one-half months of the course of the audit. In other words I would have difficulty as Mr. Eustice had difficulty in placing any particular time on it whether it occurred during our first discussion or in connection with some other item that we were discussing.

(Testimony of Samuel J. Proebus)

Q. It could have been the first time you met William Shubin, could it?

A. It could have been that time, yes.

Q. And Mr. Shubin was present and William Shubin and was there anyone else present?

A. I think Jack Kissel was present too.

Q. All right. Now, will you state what you said on that occasion with respect to the government disclosures, what was said about either you disclosing it or your depart- [411] ment disclosing it?

A. I would like to point out that I merely said that it could have been. I mean my memory is not strong enough on this point to say that it was discussed. I remember occasions during the course of the audit when it was discussed but if it is permissible I could reproduce in part what my memory indicated as to the conversation which Mr. Schlick and I had with Bill Shubin at the first time I talked to them, and as I reflect it inwardly in my mind it appears to me that this could not have been said at the time because of the topics which we discussed on our first meeting.

Q. Well, first as near as you can when you had this discussion, whether it was the first or the second or what.

A. I would be inclined to think it was the latter part of September.

Q. And was it at the plant of the defendants?

A. It was at the plant of the defendants.

(Testimony of Samuel J. Proebus)

Q. Now, state what was said.

A. Bill Shubin expressed the fear that the matters which we were discussing would be revealed to the OPA and I told him that regardless of the origin of the funds or what illegitimate business the taxpayer might be in that it was the policy of the Bureau to consider these returns confidential, and either on that occasion or another occasion I pointed out to him that even in court that I could not testify in relation to [412] the things which he was telling us unless I was authorized to do so.

Mr. McLaughlin: That is all, Mr. Phoebus.

Cross Examination

By Mr. Strong:

Q. This conversation that you had, that was after the conference that you or Mr. Bircher had in the office at which the attorneys for the defendants were present?

A. Yes, sir.

Q. And you heard Mr. Bircher testify as to what was said to them at the conference?

A. Yes, sir.

Q. Is that your recollection of what was said to them?

A. Yes, sir.

Q. And did the defendants or their attorneys at these conferences indicate in any way that they had made any independent investigation as to this matter?

A. They did.

Q. And that they were satisfied to permit their clients to testify?

A. Yes, sir.

(Testimony of Samuel J. Proebus)

Q. And you have now been authorized or directed by the Commissioner of Internal Revenue to give this evidence in this court? A. Yes. [413]

Mr. Strong: That is all.

Redirect Examination

By Mr. McLaughlin:

Q. Mr. Phoebus, can you fix approximately the time of this discussion with relation to the time Mr. Shubin made this statement in the office of the Bureau? How much time elapsed between those two events?

A. The statement was given in the office on July 24th and as I just testified the conversation which I testified to was some time in the latter part of September.

Q. When did you first go to the plant of the defendants?

A. During the first two weeks of August, August 7th I believe it was, but I am not sure of that date. I have it, of course, in my diary.

Mr. McLaughlin: That is all.

Recross Examination

By Mr. Strong:

Q. That is September of 1945? A. Yes, sir.

Q. August of 1945 also? A. Yes, sir.

Q. And the conference was July of 1945?

A. Yes, sir.

Mr. Strong: That is all.

(Witness excused.) [414]

Mr. McLaughlin: I will call Mr. Schlick.

WALTER E. SCHLICK

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name?

The Witness: Walter E. Schlick.

Direct Examination

By Mr. McLaughlin:

Q. Where do you reside, Mr. Schlick?

A. 1520 Marcedenia, Torrance, California.

Q. What is your occupation?

A. Special agent of the Intelligence Unit, Treasury Department.

Q. And you work with Mr. Phoebus at times?

A. Yes, at times.

Q. Are you acquainted with the defendants in this action, William Shubin, Frederick Shubin and Jack Kissel?

A. Yes, sir.

Q. Do you recall a discussion that you were present at regarding your department revealing information that they gave you?

A. Yes, sir.

Q. Will you state when that took place as near as you can, Mr. Schlick?

A. The date will have to be established as being an [415] approximation. As has been previously testified when the investigation continued over a period of time conversations are had at various intervals and as to segregate any particular conversation with reference to any particular date, it is physically impossible. I would say that as near as I can recall that particular conversation was in the latter part of August or the first part of September of 1945.

(Testimony of Walter E. Schlick)

Q. And that was at the plant of the Shubins?

A. Yes, sir.

Q. Will you state what you said and what they said as near as you can?

A. The conversation was relative to the confidential matters which were being discussed at that time which, of course, so far as we were concerned, was merely income tax matters and the defendants were concerned about the information becoming common knowledge to the OPA officials.

We could not conscientiously assure them that the information would never be made known to them, but we did say that it is the policy of the Bureau to not divulge that information, that information given in the course of a tax investigation is inviolate and is confidential and should not be revealed to anyone except those authorized by the Treasury Department.

Q. Is that substantially all?

A. I think so. [416]

Mr. McLaughlin: Thank you.

Mr. Strong: No questions.

The Court: That is all.

(Witness excused.)

Mr. McLaughlin: Your Honor, I desire to call Mr. Strong.

The Court: All right.

Mr. Strong: I don't know whether I am authorized to testify in these proceedings, your Honor.

Mr. McLaughlin: We will let the court decide.

The Court: I will determine that.

Mr. McLaughlin: We haven't gotten any help yet and I am going to try and get some now.

WILLIAM STRONG

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: William Strong.

Direct Examination

Mr. Strong: I might say that I testified in one proceeding and was later told that I had no right to do so, and that is why I mentioned it.

By Mr. McLaughlin:

Q. Mr. Strong, you are connected with the office of the United States Attorney in the Southern District of California? A. Yes, sir.

Q. And will you state what your title or your capacity is?

A. Special Assistant to the United States Attorney.

Q. And how long have you been so connected?

A. Approximately a year or slightly over a year.

Q. Do you recall this letter of September 27, 1945, that is in evidence as part of Exhibit 55 which was sent to the Attorney-General?

A. The one that I wrote, you mean?

Q. Yes. A. Yes.

Q. Now, after you wrote that communication, Mr. Strong, how long was it before you saw the statements which I will show you and which are marked for identification as Exhibits 50, 51 and 52?

A. I can't say exactly how long, but I can state that I saw those statements after the Internal Revenue Agents had received the letters of authority from the Commissioner of Internal Revenue to show me those.

(Testimony of William Strong)

Q. Yes. Mr. Strong, to refresh your mind, I think those are dated October 10, 1945.

A. It was after whatever the date was that they received those letters. [418]

Q. When you say those letters, you have reference to these three letters that are in evidence as Exhibits 53, 56 and 54? A. That is right.

Q. Have you any way of fixing how long after it was that you received those letters?

A. No, it is very hard to say. I was engaged in conducting a grand jury investigation which is not as yet completed. We are still conducting it and I was examining a large volume of documents at all times and I was talking with witnesses on all sorts of matters. There were hundreds of witnesses and it is almost impossible to even try to localize the date, but I would say it was shortly after those letters were received by the Internal Revenue agents.

Q. And as soon as they were delivered to you, you read them through?

A. I don't remember whether I read them through as soon as they were delivered. I read them through at one point or another.

Q. Would you say it was in October of 1945 that you read them through?

A. I can't say that because I was handling cases on appeal at the same time, cases on trial and on Wednesday squeezing in the grand jury investigation. I really couldn't specify any date, but I should imagine that I must [419] have read those statements shortly after they were given to me because I was curious to know what was in them, but the exact date I don't know.

(Testimony of William Strong)

Q. And at the time you were working on an investigation, a grand jury investigation, relating to these defendants?

A. I was working on a grand jury investigation relating to a large number of concerns and individuals and I couldn't say honestly now that these defendants were at all implicated or being investigated at that time.

Specifically I remember one of the concerns being investigated was the Southern California Meat Company. That company had a large number of customers and one of the customers of that company was the Vernon Hotel and Restaurant Supply Company. I interviewed a large number of people who had dealings with the Southern California Meat Company and that was the first time that I got in contact or happened to talk to the people representing the Vernon Hotel and Restaurant Supply Company, but where they came in, what date they came in, it is very hard to say. We had so many witnesses and people that we talked to that it is very hard to say.

Q. Well, could you fix it the latter part of June of 1945?

A. Yes. I should imagine it would be about that time. [420]

Q. During the time that the grand jury investigation was proceeding?

A. Yes. The grand jury has never been dismissed. It has been continued over by court order.

Q. Did you discuss these statements marked Exhibits 50, 51 and 52 for identification with any representatives of the Bureau of Internal Revenue?

The Court: They are in evidence.

Mr. McLaughlin: I didn't hear you.

(Testimony of William Strong)

The Court: They are in evidence, not for identification.

Mr. McLaughlin: No, they are not in evidence, your Honor. These three were not received.

The Court: Oh, all right.

The Witness: Did I discuss them with them?

Q. By Mr. McLaughlin: Yes.

A. You mean the physical documents or the contents?

Q. Well, did you discuss the contents of the documents?

A. I don't remember having discussed it except possibly to remark about certain things in it on some occasions, but there was no discussion of the documents or statements in it in detail at all at any time.

Q. Well, who did you have any discussion with? You said you remarked about some of the items.

A. Oh. When they brought them down I remember that they said these were part of the material that they had and [421] I then glanced through them and asked them in general of what it was comprised and what it had to do with, but I didn't go into any questions and answers.

Q. And they left them with you when they brought them down?

A. Yes, and I think I had them in my possession at all times since the time they left them there. I don't remember their ever going out of my possession. They are very important documents to us.

Mr. Neukom: Your Honor, may I object to this? This matter does not go into any issues of the case itself. Consequently I think it is a matter, while I don't object to the jury being here, it nevertheless does not prove or

(Testimony of William Strong)

disprove any of the issues of the case. It might go to an appropriate motion had counsel seen fit to file it on his motion to quash, but there is nothing factual in this testimony.

It is the procedure that may have been followed or may not have been followed by the government but whatever Mr. Strong may have done or may not have done he could not bind the government contrary to what is proper. The grand jury has heard this proceeding. A true bill was issued and the matter is now before the court on a factual proposition and I don't think what Mr. Strong did or did not do has any materiality.

The Court: I don't think so either, but I am going to [422] permit counsel to ask some more questions.

Mr. McLaughlin: Was the last question answered?

The Reporter: Yes.

Q. By Mr. McLaughlin: Who were the men that brought them down?

A. I don't remember that either. However, it probably was Mr. Bircher. I think Mr. Bircher and Mr. Phoebus might have been the two. I don't remember seeing Mr. Eustice there and I don't remember seeing Mr. Schlick.

Q. After the first occasion when they brought them to you, did you discuss the contents of those documents with any representatives of the Department of Internal Revenue?

A. I don't think I ever discussed the contents of those documents except to remark as to one or two things possibly, and to ask for some further material. One of those documents for example reveals that there was an accountant's report which is in evidence and I asked for that report.

(Testimony of William Strong)

Q. You asked one of the representatives of the Department of Internal Revenue for that report?

A. I think I asked Mr. Bircher for that report.

Q. That is this report in evidence as Exhibit 58?

A. Yes.

Q. Now, did you use the information that you obtained from these three statements to which I am referring in any [423] way in connection with the grand jury?

Mr. Neukom: That is objected to as being wholly immaterial.

The Court: Sustained. I have listened to this extensively but I don't believe that we are going to try the grand jury in here. The grand jury had their duty to perform and they performed the duty and I don't believe we have any right to call the grand jury in here and start another case. It is entirely collateral. All right.

Mr. McLaughlin: Well, your Honor, I suppose that the record should show and I think that I may state it without being prejudicial in any way with the jury being present—it goes to the objection I made all the way through on these documents.

I am claiming that they were obtained by the government unlawfully and it is a search and seizure proposition that I argued to your Honor previously in this case, and I want to show that the United States Government has used documents that they obtained without right and not pursuant to the law for the purpose of getting an indictment against these parties.

Now, that is the sole purpose of this line of testimony.

The Court: But you stated to the court that you had absolutely no evidence of that at all but that you were just on a fishing expedition to find out if that was true.

(Testimony of William Strong)

I asked you that in your argument and you said that you had no [424] evidence of it but that you wanted to find out.

Mr. McLaughlin: Your Honor, I can say now that I am proceeding on the theory that my defendants have the right to find out. In other words, it is possible that they had these before the grand jury investigation was hardly under way.

The Court: The government told you that they never used any of these in the grand jury investigation.

Mr. McLaughlin: I am merely making my record and that is all I care about.

The Court: All right. You have made it.

(Witness excused.) [425]

Mr. McLaughlin: I would like to call Mr. Brady.

JOSEPH D. BRADY

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Joseph D. Brady.

The Clerk: B-r-a-d-y?

The Witness: That is right.

Direct Examination

By Mr. McLaughlin:

Q. Where do you reside, Mr. Brady?

A. Los Angeles.

Q. What is your occupation?

A. I am an attorney at law, but I have been specializing for many years in income tax matters.

(Testimony of Joseph D. Brady)

Q. How long have you specialized in the income tax law practice? A. 24 years.

Q. Are you acquainted with William Shubin, Frederick Shubin, and Jack Kissel? A. I am.

Q. Did these gentlemen come to you during the year of 1945 on some professional matter?

A. They did. [426]

Q. Was that a matter involving taxation?

A. That is right.

Q. After these gentlemen talked to you regarding their problem did you contact anyone connected with the Bureau of Internal Revenue, either in Los Angeles or Washington, D. C., regarding that matter? A. I did.

Q. Will you state approximately when and who that was?

A. Well, my first contact was within ten minutes of the first time I ever saw any of the gentlemen you have named, and the first one that I saw was Mr. William Shubin. I believe he was alone when I first met him. I immediately got on the long distance telephone with Washington, D. C., and talked with Mr. Timothy Mooney, who, for many years, had been Deputy Commissioner of Internal Revenue, but who had resigned about a year before.

The Court: That is not admissible.

Mr. Neukom: This is collateral.

The Court: That is not admissible at all, who he talked to in Washington. Proceed, counsel.

Q. By Mr. McLaughlin: Mr. Brady, tell us about the first discussion you had with anyone connected with the Bureau of Internal Revenue, that was then connected?

A. With Mr. George D. Martin, who was the Internal Revenue Agent in charge in Los Angeles, California. [427]

(Testimony of Joseph D. Brady)

Q. Where was that conversation?

A. In his office.

Q. And will you state the approximate date?

A. Oh, my recollection is that I was first consulted by these gentlemen in May or June of 1945. My office records would show; but that is my best recollection, and within three or four days of that I called on Mr. Martin.

Q. Anyone present besides you and Mr. Martin?

A. No.

Mr. Neukom: I don't like to interrupt, your Honor, but I think that this is all collateral to any of the issues of this case.

The Court: This is not a tax case that we are trying. This is not a Department of Internal Revenue case, as I understand it.

Mr. McLaughlin: It goes right down to the same proposition again, your Honor, that this information, I propose to prove, was given under the assurance that it would not be used in any litigation at all. And I think that these gentlemen——

The Court: The evidence here shows that they were told it would be used.

Mr. McLaughlin: I have the right to refute that evidence; and furthermore, this was the attorney who went to see the head of the office before these other men ever made [428] that statement.

The Court: You have a right to refute it by the people who stated it; but you haven't a right to refute it by some other party. Can you bring in here 50 people to say, "Why, Mr. Brady went out and he told them this and he told them that"?

(Testimony of Joseph D. Brady)

Mr. McLaughlin: Your Honor, I submit that I have the right to show that Mr. Brady went to the head of the Department here and explained his problem, and that the head of the Department gave him an assurance that the information that they gave would not be used in litigation or by the OPA.

The Court: Overruled. Proceed.

Q. By Mr. McLaughlin: Mr. Brady, will you state what the conversation was with Mr. Martin?

The Court: The same objection. Overruled.

A. I asked Mr.——

The Court: No. Just a moment. It is not admissible at all. It is not admissible at all. This is not a tax case.

Mr. McLaughlin: You mean sustained?

The Court: Sustained.

Mr. McLaughlin: Your Honor, then, just for the offer of proof: I offer to prove by this witness that he talked to Mr. Martin and to other officials of the Bureau of Internal Revenue and was assured by them that any information that the Shubins gave in connection with the amended tax returns which [429] they were filing would not be used in any criminal proceeding against them in any court.

The Court: Proceed with another question.

Mr. McLaughlin: Your Honor has sustained an objection to the discussion with Mr. Martin?

The Court: Certainly. It has no place at all in this case.

Q. By Mr. McLaughlin: Mr. Brady, did you have discussion with anyone else connected with the Bureau of Internal Revenue regarding that matter?

(Testimony of Joseph D. Brady)

A. Yes; I had discussion with Mr. Bircher, Mr. Donald Bircher, as to the general policy of the Bureau of Internal Revenue.

Q. Will you state about when that was?

A. It was right at the—Mr. Bircher contacted me right within three or four or five days after the amended returns, prepared under my supervision, were filed, and which I think was about June of 1945; as I recall, came to my office to borrow my retained copy of the returns on a Saturday morning.

The Court: Now, a great deal of that is not responsive to the question at all. Strike it out.

Q. By Mr. McLaughlin: Who was present, Mr. Brady? A. How is that?

Q. Who was present besides you and Mr. Bircher? [430]

A. I think Mr. Phoebus was with Mr. Bircher that day.

Q. Will you state what was said on that occasion with respect to the policy of the Government in connection with this information?

A. I couldn't be sure that it was on that occasion, but if it was not on that occasion, it was on a preceding day, over the telephone with Mr. Bircher as to the policy of the Bureau of Internal Revenue in disclosing—

Mr. Neukom: I object to this, your Honor, because, after all, Mr. Bircher cannot bind the Government; and furthermore, as far as the law requires us to produce it, evidence has been produced.

The Court: The contention of the defense, as I take it here, is that the agent of the Government can set aside the statutory requirements, which is something new to the court. In other words, the law provides how and what

(Testimony of Joseph D. Brady)

method and under what circumstances these returns may be used. With reference to the partnership returns it was complied with. It was not complied with as to the individuals and I excluded it.

Now, as I take it, the defense position is that an agent can waive and can set aside the direct mandate of the law. I do not believe that is the law. I do not believe that an agent can bind the Government and set aside a direct provision of law. The law was complied with, the court [431] finds, with reference to the partnership, but it was not complied with with reference to the individuals, and I so held and sustained the objection of the defendants that those returns could not be used, and I sustained the objection of the defendants when the offer again was made with reference to the returns in evidence.

I do not believe that an agent can amend the statute.

All right; let the record show the offer of proof has been made here by the defendants, so the defendants will have every protection under the law.

Mr. McLaughlin: That is all, you Honor.

Mr. Neukom: I just want to ask you one or two questions, Mr. Brady.

Cross Examination

By Mr. Neukom:

Q. Mr. Brady, you were present on July the 24th, 1945, when statements were made by William A. Shubin, were you not—I beg your pardon. You were present when the conference was held up in Mr. Bircher's office and Mr. Phoebus' office here in the building?

A. Yes, I was present.

Q. On the eighth floor?

A. Yes.

(Testimony of Joseph D. Brady)

Q. And you brought Mr. William Shubin, and later, Mr. Frederick Shubin to that conference, didn't you? [432]

A. Yes; they were there.

Q. No subpoena had been served on either of them to your knowledge? A. No.

Q. And you came in voluntarily to discuss the matter, didn't you, Mr. Brady?

A. Yes; pursuant to the understanding that I had.

Q. And it is true that at that time, among others, a question such as this was asked of Mr. Shubin before he gave any replies: "You are advised, Mr. Shubin, that any statements you make at this hearing or conference, or any documents produced may be used by the Government in any subsequent proceedings, and that you have the right to refuse to answer any questions that you feel might tend to incriminate you? Do you understand that, or do you wish your attorney to explain it to you?" You recall that such a question or explanation was made by Mr. Bircher to Mr. Shubin? A. That is right.

Q. And Mr. Shubin replied that: "I believe I understand that," did he not?

A. If the record shows, and my recollection is he said substantially that.

Q. And is it not true that you also counselled with Mr. Shubin and there was some, as you attorneys call it, discussion off the record where you advised Mr. Shubin that [433] it was proper to go ahead and answer the interrogatories that were given?

A. I believe that is so.

Q. And it is true that at a later date, a few days later, after this report had been written up or the proceedings had been written up, that Mr. Shubin was

(Testimony of Joseph D. Brady)

accorded the privilege to come to the office of Mr. Bircher here in this building, was given the original and copies of the proceedings that had been taken, and did in your presence sign all of the documents which reflected the questions and answers?

A. That is true, but only after a reiteration of the specific understanding that they were for the eyes of the Treasury Department only.

Mr. Neukom: May I move that the answer be stricken as not responsive?

The Court: That is stricken out, but I am going to permit the witness to state the conversation very completely if the question is asked. If not, I am going to permit the defense counsel to ask the question.

Mr. Neukom: Very well.

The Court: Proceed. Any other questions?

Mr. Neukom: Yes.

Q. And this is Mr. Shubin's signature that was signed to the document in question?

A. It looks like it to me. [434]

Q. And signed on August 13, 1945?

A. I have no doubt that is the date.

Q. And the same policy in general was followed as to Frederick Shubin, only his matter was taken up in the afternoon, wasn't it, Mr. Brady?

A. Oh, I think all the papers were signed at the same time, one particular morning. We may have stayed there until two o'clock.

Q. But I mean they were interrogated upon the same explanations, that whatever might be obtained might be used against them: isn't that correct?

A. The same policy was followed.

(Testimony of Joseph D. Brady)

Mr. Neukom: That is correct. I was referring to what was Government's Exhibit 50 for identification. That is all.

The Court: Mr. McLaughlin?

Redirect Examination

By Mr. McLaughlin:

Q. Mr. Brady, you said that they signed those statements after reiteration of the assurance. Would you state what was said and who said it?

A. Mr. Bircher was there in the early part of the morning. He was not there at the time the statements were signed, but before they were signed, I turned to Mr. Phoebus who was there and I said to Mr. Phoebus: "It is the understanding, is it not, that these are for the eyes of the [435] Treasury Department only?", and he answered, to my recollection, "Yes."

Mr. McLaughlin: That is all.

Mr. Neukom: May I just ask one more question?

Recross Examination

By Mr. Neukom:

Q. Mr. Brady, you have been an attorney for a great many years, have you not? A. 26.

Q. Yes. And, of course, you were acquainted with the doctrine that most lawyers know, that we endeavor to put into writing all of our understandings? In other words, a written document best expresses the understandings of the parties?

The Court: Generally speaking.

A. I don't see how you can apply a generalization of that sort to this situation.

(Testimony of Joseph D. Brady)

The Court: I said, "Generally speaking."

Q. By Mr. Neukom: Mr. Brady, you had a copy of this statement that your client signed at that time, didn't you? Were these given to you? A. Yes.

Q. And you did not insist that any such phraseology or words be incorporated in that document before they signed it, did you? [436]

A. The document can speak for itself.

Q. My question is: Did you?

The Court: Well, I think Mr. Brady has answered it perfectly. He said the document speaks for itself.

Mr. Neukom: Then I offer the document into evidence.

Mr. McLaughlin: Objected to on the ground that it is not probative of any issue, and on the further ground that it is privileged.

Mr. Neukom: Your Honor, I offer it under the partnership aspect alone, as to the limited aspect as it deals with the partnership alone and in view of the answer of the witness. I now feel that we have the right to offer the document.

Mr. McLaughlin: Before a ruling is made thereon, I offer to stipulate that there is nothing in the document whereby Mr. Brady requested that there be anything in writing regarding the understanding he just testified to.

The Court: Under that stipulation of the defense, I will refuse to admit the document into evidence.

Mr. Neukom: Very well, your Honor. That is all, Mr. Brady.

Mr. McLaughlin: That is all, Mr. Brady. Thank you.

Pardon me just a moment, your Honor. Your Honor, the defense has no further witnesses or evidence to offer in this case.

The Court: Are there any instructions that either the [437] Government or the defense wishes the court to examine?

Mr. Strong: I have them upstairs, your Honor. I did not expect the trial to end so soon. I have a complete set of instructions upstairs.

The Court: Mr. McLaughlin?

Mr. McLaughlin: I have some here, your Honor, and I have some more. I had no idea this case was going to end today.

The Court: I did not, either.

Mr. McLaughlin: And I have some at my office and I have some here.

Your Honor, before this case is submitted, there are some motions and I don't care to argue them, but I want to renew the same motions.

The Court: I want to examine the suggested instructions carefully and I am starting another case tomorrow afternoon at two o'clock. I cannot give all the morning to the examination of instructions.

Mr. Strong: I can bring mine tonight, your Honor. I haven't them here.

The Court: How long a time, gentlemen, do you want to argue the case?

Mr. Strong: It will take me less than an hour.

The Court: Mr. McLaughlin?

Mr. McLaughlin: Well, I can finish mine in an hour.
[438]

The Court: That is two hours.

Mr. Strong: And then about 15 more minutes for the closing.

The Court: An hour and 15 minutes?

Mr. Strong: Altogether, yes, maybe even less.

The Court: That is two hours and a half. That runs up into the afternoon, and then an hour for the instructions to the jury.

Mr. Strong: Well, that was a very conservative estimate, giving myself that outside time. I probably would not speak that long at all.

The Court: I always want to give attorneys ample opportunity to present their arguments to the jury, because it is important that they be thoroughly presented.

Mr. McLaughlin: I would like to request your Honor to postpone the matter until Tuesday of next week.

The Court: Oh, no; I could not possibly do that. The jury would forget all about it and I would forget most of the facts, too.

Mr. Strong: I think, if defense counsel will only take an hour, we can probably get ours together in an hour so that we won't take too much time.

(The court admonished the jury and excused the jury until 9:30 o'clock a.m., the following day, Friday, June 21, 1946.) [439]

Mr. McLaughlin: Does your Honor want to hear those motions now?

The Court: Yes.

(The jury retired from the courtroom.)

The Court: Mr. McLaughlin, if you will come over nearer the reporter?

Mr. McLaughlin: Your Honor, I desire to renew each of the motions for acquittal that I heretofore made at the close of the Government's case, on each of the grounds stated therein and as to each of the defendants that I mentioned in those motions.

And I also desire to renew my motions to strike the evidence which I made at that time, and which I have heretofore made during this trial, on the same grounds stated at those times. And I think that covers all the motions, your Honor.

The Court: It will be understood that the defense counsel, without repeating verbatim the motions that were heretofore made,—it will be understood that they have all been renewed at this time by the counsel for the defendants. So understood by the court and by the Government?

Mr. Strong: So stipulated.

Mr. McLaughlin: Your Honor, before we adjourn, I want to say this: This question of law that I argued just after the lunch hour is a question of law which I think will [440] permeate this entire case. And I am going to be very candid with your Honor. Personally, I think that

it is good; your Honor thinks that it is not. I have relied upon that in this case, and I would like at some time or another—but I am not urging it if your Honor is fully satisfied with the position—but I would like to request a reconsideration of that point, because I am not sure from the comments that your Honor made at the rulings that your Honor fully comprehends or understands the point that I tried to make regarding that evidence. And I just make that request, and I make it subject to whatever disposition your Honor wants to make.

The Court: I am quite familiar with it and I have been through the matter before, Mr. McLaughlin; so I am quite satisfied with that ruling, because whenever I find a point that I am not fully conversant with, I stop right there and request either an oral argument or a brief submitted.

Let the record show the motions made by the defense are overruled, an exception is allowed to each and every one of them.

Mr. McLaughlin: Thank you, your Honor.

The Court: 9:30 tomorrow morning.

(Whereupon, a recess was taken until 9:30 o'clock a.m., Friday, June 21, 1946.)

[Endorsed]: Filed Jul. 1, 1946. [441]

[GOVERNMENT'S EXHIBIT NO. 50]

[For identification only; not received in evidence]

SWORN STATEMENT OF MR. WILLIAM A. SHUBIN GIVEN IN THE OFFICE OF THE INTELLIGENCE UNIT, BUREAU OF INTERNAL REVENUE, ROOM 844, U. S. POST OFFICE AND COURT HOUSE, LOS ANGELES, CALIFORNIA, JULY 24, 1945

Present:

Donald O. Bircher, Special Agent

Samual J. Phoebus, Special Agent

Walter E. Schlick, Special Agent

Joseph D. Brady, Attorney for taxpayer

Stanley C. Anderson, Attorney for taxpayer

Gladys M. Callaway, Stenographer

(Questions propounded by Mr. Bircher unless otherwise indicated)

Q. Mr. Shubin, you are here today ready and willing to give a sworn, voluntary statement relative to your income tax liability for the years 1942 and subsequent thereto; is that correct? A. Yes, sir.

Q. Your representatives here, Mr. Anderson and Mr. Brady, are your tax representatives in this matter; is that correct? A. Yes, they are.

Q. Will you raise your right hand and be sworn? Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth in this examination, so help you God? A. I do.

Q. For the record will you state your name and present address?

(Government's Exhibit No. 50)

A. William A. Shubin, 4551 Brompton Avenue, Bell, California.

Q. You are advised, Mr. Shubin, that any statement you make at this hearing or conference or any documents produced may be used by the Government in any subsequent proceeding; and that you have the right to refuse to answer any question that you feel might tend to incriminate you. Do you understand that or do you wish your attorney to explain it to you?

A. I believe I understand that. You mean any answers that I think might incriminate me, I should not answer.

Q. Yes, based upon the advice of your counsel.

(Mr. Brady): I think he is laboring under a misapprehension when he raised the question that he should not answer. I think that shouldn't be. His choice, I think, is that he will answer any question that you ask him. I think he has the understanding that he has the right to refuse to answer.

A. Yes, that's right.

W.A.S.

(Mr. Bircher): That's right. He has the right to refuse to answer if he believes such answers might tend to incriminate him. Do you want to give him any more advice, Mr. Brady?

(Mr. Brady): No.

(Mr. Bircher): For the record, and before we start to question Mr. Shubin, do you care to make any statement for the record, Mr. Brady or Mr. Anderson, as to the basis for bringing him here this morning and as to what you propose to do?

(Government's Exhibit No. 50)

(Mr. Brady): I didn't expect that I would be allowed to make such a statement, but I would like to make a statement and I would like Mr. Anderson to supplement it as to details:

Under date of June 29, 1945, I signed for our firm a letter addressed to the Collector of Internal Revenue, Washington, 25, D. C., transmitting certain returns and amended returns of the Vernon Hotel & Restaurant Supply Company, a partnership, and of the persons who were the members of that partnership from and after November 16, 1942, and of the wives of such persons. That letter outlines in general the circumstances under which the Shubins and Mr. Kissel came to our office seeking our advice, and further outlines what advice we gave them and what was done pursuant to that advice. I would like to incorporate that letter as a part of my statement here. I might say that I would not have accepted employment in this matter had I not felt certain from the outset that the filing of the original returns, though concededly those returns understated the amount of income and tax, was not an attempt to evade tax. I don't want to go into the details as to the basis for that conclusion. I merely want to state it as I think the Bureau officials would prefer for Mr. Shubin, Mr. Shubin's brother and Mr. Kissel to make their own statements which, I think, will lead to the conclusion that they did not attempt to evade any tax.

(Mr. Bircher): Very well then, we will incorporate your letter of June 29, 1945, as part of your statement here.

(Government's Exhibit No. 50)

"BRADY & NOSSAMAN

Counselors at Law

433 South Spring Street

Los Angeles 13

June 29, 1945

Commissioner of Internal Revenue

Washington 25, D. C.

Sir :

Enclosed are certain returns and amended returns of Vernon Hotel & Restaurant Supply Co., of 3301 East Vernon Avenue, Los Angeles 11, California, a partnership, of the persons who were members of the partnership from

W.A.S.

and after November 16, 1942, and of the wives of such persons.

In 1940 William A. Shubin and J. D. Johnson formed a partnership known as Vernon Hotel & Restaurant Supply Co. This partnership was terminated and dissolved on November 14, 1942. Johnson sold, transferred, and assigned his interest in the assets of the dissolved partnership to Frederic Alexander Shubin and Jack L. Kissel. On November 16, 1942, William A. Shubin, Frederic Alexander Shubin, and Jack L. Kissel entered into an oral partnership agreement and have at all times since that date been doing business as partners under the name of the prior partnership, Vernon Hotel & Restaurant Supply Co. By their oral partnership agreement they agreed to share profits and losses equally.

The prior partnership (which consisted of Johnson and William A. Shubin and which was dissolved on Novem-

(Government's Exhibit No. 50)

ber 14, 1942) erroneously filed a partnership return (Form 1065) covering the entire calendar year 1942, and the new partnership (which was formed on November 16, 1942) did not file a 1942 return. What the members of the new partnership then thought were the entire net profits of the partnership, in accordance with its books (\$1581.98), for the period from November 16 through December 31, 1942, was erroneously included in gross sales on the partnership's 1943 return (Form 1065). The errors set forth above are attributable to the fact that the partnership books were kept and its returns were prepared by persons unskilled in the keeping of books and the preparation of tax returns.

Throughout the calendar years 1942, 1943, and 1944, William A. Shubin was married to Julia T. Shubin. Jack L. Kissell was married to Jean T. Kissel, and Frederic Alexander Shubin was unmarried. William A. Shubin was married to Julia T. Shubin on August 20, 1929. His contribution to the partnership formed with Johnson in 1940 consisted of about \$36.00 in cash, all of which was the community property of Julia T. Shubin and himself. Jack L. Kissel was married to Jean T. Kissel on June 18, 1938. His contribution to the partnership formed with William A. Shubin and Frederic Alexander Shubin on November 16, 1942, consisted of property acquired from Johnson at a cost of about \$700.00. The \$700.00 which Jack L. Kissel used to buy such property from Johnson was the community property of Jean T. Kissel and himself. William A. Shubin and Julia T. Shubin, and Jack L. Kissel and Jean T. Kissel, have at all times since their respective marriages been residents of and domiciled in California.

(Government's Exhibit No. 50)

William A. Shubin filed separate returns for 1942, 1943 and 1944. Julia T. Shubin did not file returns for 1942 and 1943, for the reason that William A. Shubin's returns for those two years included all of his share of the earnings of the partnership for that year as shown by its books, and Julia T. Shubin had no other income. For 1944 William A. Shubin and Julia T. Shubin each filed a separate return. Each returned one-half of William A. Shubin's share of the partnership earnings as shown by its books.

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William A. Shubin erroneously reported on his return, however, one-third of the rent received from an apartment house acquired in March, 1944, in the proportions shown, by the following persons:

William A. and Julia T. Shubin	45%
Frederic Alexander Shubin	45%
Jack L. and Jean T. Kissel	10%

William A. Shubin and Julia T. Shubin should have each reported 22-1/2%.

Frederic Alexander Shubin erroneously reported on his 1944 return 1/3 of the rents from the apartment house, whereas he should have reported 45% thereof.

Jack L. Kissel erroneously reported on his 1944 return one-third of the income from the apartment house, whereas he and Jean T. Kissel should have each reported 5% thereof.

None of the persons claimed depreciation on the apartment house and its furnishings.

Jack L. Kissel and Jean T. Kissel filed a joint return for 1942. Jack L. Kissel filed separate returns for 1943

(Government's Exhibit No. 50)

and 1944. Jean T. Kissel did not file a return for 1943, for the reason that Jack L. Kissel's 1943 return included all of his share of the earnings of the partnership for that year as shown by its books, and Jean T. Kissel had no other income. Jean T. Kissel filed a separate return for 1944.

On the partnership returns originally filed for the years 1942, 1943, and 1944 there was deducted from each partner's share of the partnership earnings 20% thereof as an earned income credit. In other words, only 80% of a partner's share of the earnings was reported on his individual return (or the individual returns of himself and his wife, or their joint returns). This error is attributable to the inexperience and lack of knowledge of the person whom the partners employed to prepare the returns and who they reasonably believed was competent. The partnership returns as originally filed also contain other more minor errors.

The enclosed returns and amended returns reflect partnership earnings not previously returned and for the most part not shown on its books as follows:

<u>Period of Year</u>	<u>Amount</u>
November 16, through December 31,	
1942	\$ 4,158.02
1943	72,419.39
1944	64,547.59
	<hr/>
Total	\$141,125.00

W.A.S.

(Government's Exhibit No. 50)

We are advised by a certified public account (whom the partnership recently engaged at our request to compile data on which to base the returns enclosed herewith) that none of the partnership income not previously returned appeared as income on the partnership books. The partners have considerable knowledge of the commodity in which they deal, but are, in our opinion, almost completely unformed about accounting, the keeping of books, and the preparation of income tax returns. The person they engaged in 1943 to unsnarl the mistakes of a prior bookkeeper and to prepare their tax returns knew, we fear, not much more about such matters than the partners themselves, as illustrated by his inclusion on the individual returns of only 80% of the partnership earnings, his failure, prior to 1944, to prepare separate returns for husband and wife, his improper allocation of the income from the apartment house, and his failure to deduct depreciation thereon. To a considerable degree it was a case of the blind leading the blind. The foregoing is not intended, however, serious as the errors mentioned were, to attempt to convey the impression that the failure of the partners to return the full amount of the income of the partnership was inadvertent; such was not the case.

The enclosed returns and amended returns are filed voluntarily. No audit by a Revenue Agent of the returns of the partners and their wives for the years in question has been made or (so far as they know) proposed. They consulted and retained us on May 14, 1945, asking that we prepare the returns which are now enclosed. The partnership books and records were in such unsatisfactory conditions that we required that a certified public account-

(Government's Exhibit No. 50)

ant be engaged to compile the data required for the returns. In accordance with our request the partners engaged Mr. Henry J. Rausch, a highly reputable certified public accountant of 318 West Ninth Street, Los Angeles 15, California, on May 28, 1945. Mr. Rausch completed his work in this connection on June 25, 1945. Attached hereto is a letter dated June 27, 1945, from Mr. Rausch to us regarding the method he used in carrying out the assignment we gave him.

At no time since May 14 have the partners and their wives deviated from their intention and desire to return correctly their entire income for the years involved. The delay from May 14 to the present is attributable solely to the fact that such period was required for compilation of the required data and preparation of the rather large number of returns. As a matter of fact, the determination of the partners to file amended returns was arrived at much earlier than May 14, but for a considerable time they were at a loss as to how to proceed in the matter.

This letter and the enclosed return are forwarded to you instead of directly to the Collector at Los Angeles (Sixth California District) in accordance with the suggestion of Mr. Timothy C. Mooney, of 1100 Bowen Building, 821 - 15th Street, N. W., Washington 5, D. C., who at our request conferred with Mr. Norman S. Cann, Deputy Commission, about the matter,

W.A.S.

on May 16, 1945, without, however, disclosing the names of the taxpayers involved.

There exist facts which, in our opinion, justify imposing no penalty under sections 291(2) and 293, Internal

(Government's Exhibit No. 50)

Revenue Code. We are convinced that the failure of the partners and their wives to return their full income for the years in question was not motivated by any intent to evade taxes. The attendant facts and circumstances will be fully disclosed to the Revenue Agent assigned to audit the returns.

Enclosed are returns and checks as follows:

<u>Partnership Returns</u>	<u>Total Net Income</u>
1942 Amended (January 1 to November 14) for J. D. Johnson and William A. Shubin	\$ 6,468.51
1942 Original (November 16 through December 31) for Vernon Hotel & Restaurant Supply Co.	7,892.50
1943 Amended	113,453.15
1944 Amended	124,231.96

<u>Individual Returns</u>			
	<u>Amt. of Tax Due</u>	<u>Interest to 7-2-45</u>	<u>Total</u>
<u>William A. Shubin</u>			
1942 (amended) \$347.31	\$.00	\$	
1943 "	4,074.10	316.63	
1944 "	4,398.98	77.81	
	<hr/>	<hr/>	
	8,473.08	394.44	\$ 8,867.52
<u>Julia T. Shubin</u>			
1942 (original) \$347.31	.00		
1943 "	6,691.00	520.53	
1944 (amended)	4,367.85	77.73	
	<hr/>	<hr/>	
	11,058.85	598.26	11,657.11
W.A.S.			

(Government's Exhibit No. 50)

Individual Returns

	<u>Amt. of Tax Due</u>	<u>Interest to 7-2-45</u>	<u>Total</u>
<u>Frederic Alexander Shubin</u>			
1942 (amended) \$919.65	.00		
1943 “	16,071.96	\$1,250.12	
1944 “	11,724.72	208.63	
	<hr/>	<hr/>	
	27,796.68	1,458.76	\$29,255.44
<u>Jack L. Kissel</u>			
1942 (amended) joint with wife \$536.18	.00		
1943 (amended)	4,065.74	316.29	
1944 “	4,160.14	74.30	
	<hr/>	<hr/>	
	8,225.88	390.59	8,616.47
<u>Jean T. Kissel</u>			
1942 (amended) joint with husband	.00		
1943 (original)	6,835.20	533.30	
1944 (amended)	4,475.06	79.63	
	<hr/>	<hr/>	
	11,330.26	612.93	11,943.19

Also enclosed are powers of attorney dated June 29, 1945, signed by the following:

William A. Shubin

Julia T. Shubin

Frederic Alexander Shubin

Jack L. Kissel

Jean T. Kissel

Respectfully,

For Brady & Nossaman"

(Government's Exhibit No. 50)

Q. Mr. Shubin, have you just received and read over the letter signed by Henry J. Rausch, Certified Public Accountant, dated June 27, 1945, addressed
W.A.S.

to Messrs. Brady & Nossaman, with reference to Mr. Rausch's examination of the income tax liability of the partnership known as Vernon Hotel & Restaurant Supply Company and of the individual income tax returns of the partners for the year 1942 and subsequent thereto?

A. Yes, sir, I have.

Q. Are all of the statements and representations in that letter true and correct to the best of your knowledge and belief?

A. Yes, sir, they are.

Q. Then I believe it will shorten this record if we incorporate that letter as a part of your statement, if it is agreeable with you gentlemen, Mr. Brady and Mr. Anderson.

Mr. Brady: That is agreeable.

“HENRY J. RAUSCH

Certified Public Accountant

Tax Counsellor

707 Insurance Exchange Bldg.

Los Angeles

June 27, 1945

Messrs. Brady & Nossaman

433 South Spring Street

Los Angeles 13, California

Gentlemen:

At your request I am stating (1) the instructions which you gave me with reference to an investigation of

(Government's Exhibit No. 50)

Vernon Hotel & Restaurant Supply Co., a partnership, 3301 East Vernon Avenue, Los Angeles 11, California, and (2) the methods which I used in carrying out the assignment.

On April 25, 1945, you informed me of the general nature of the assignment, and asked me to call at your office on April 28 to discuss the matter in detail with you and your clients and to receive your instructions.

At our conference on April 28 you instructed me to make as thorough an investigation as possible to ascertain all partnership income not reported on the partnership federal and state income tax returns for the calendar years 1942, 1943 and 1944. You advised me that in your opinion the members of the partnership sincerely desired to disclose and return (by means of amended returns) every penny of income not previously reported, but that they did not understand accounting very well, and that their books and
W.A.S.

records had been kept by inexperienced persons. You most emphatically enjoined me to spare no effort to ascertain the full amount of unreported income. At the conference your clients approved your instructions to me, and agreed to cooperate with me to the fullest extent.

On the afternoon of April 28 I visited the partnership's place of business and began my examination of the partnership books and records and of the personal accounts and records of the three partners. I returned on subsequent days to complete my examination, and personally devoted to a total of sixty hours to the matter and had a staff accountant assist me for twenty four and one-half hours.

(Government's Exhibit No. 50)

In making my examination, I did not make a detailed audit of all of the transactions of the partnership but I examined such accounts in the general ledger and postings in the cash book and journal as I believed would disclose any amounts of income not previously reported. I also examined the personal bank accounts of the three partners. (The partners informed me that their wives had no separate bank accounts.) Deposits credited to their accounts which were found to be income not previously reported have been included in income in the amended returns. Further, I obtained a list of personal expenditures by the three partners from funds which I considered to be additional income, and such amounts have also been included in the amended returns. Lastly, the cash on hand, not recorded in any of the records, has also been included in income in the amended returns.

The attached statement for the period from November 16, 1942 to December 31, 1944, shows a total income of \$245,577.61, which, in my opinion, is the amount of income that should have been reported on the tax returns. That amount is being reported in the amended returns.

The original returns showed income for 1943 of \$41,033.76 and for 1944 of \$63,418.85, or a total of \$104,452.61. The present partnership, which was formed on November 16, 1942, did not file a return for the period from November 16 through December 31, 1942. Deduction of the reported income of \$104,452.61 from the total income of \$245,577.61 leaves income of \$141,125.00 not previously returned. This amount I have allocated as follows on the basis of my investigation and information furnished to me by the partners:

(Government's Exhibit No. 50)

<u>Period of year</u>	<u>Amount</u>
November 16 through December 31, 1942	\$ 4,158.02
Calendar Year 1943	72,419.39
Calendar Year 1944	64,547.59
	<hr/>
Total	\$141,125.00
	<hr/> <hr/>

The following items will reconcile the difference between the latter amount of \$141,125.00 and \$141,966.98 shown on the attached statement:

W.A.S.

(1) Withdrawals of \$740.00 by two of the partners, in 1942, were charged against salaries on the records. This amount has now been eliminated from expense.

(2) The original return for the year 1943 included an amount of \$1,581.98 which is attributable to the period from November 16 through December 31, 1942. That amount has been eliminated from the 1943 return and included in the return for the earlier period mentioned.

Throughout my investigation the partners and their employees cooperated with me wholeheartedly and were, in my opinion, completely frank in their disclosures to me. They made fully available to me all of their partnership and personal books and records.

The nature of the matter is such that I am unable, as you will understand, formally to certify that the amounts shown on the amended returns are accurate to the last cent. In the case of any doubtful items, however, I have

(Government's Exhibit No. 50)

resolved the doubt against the partnership and the members thereof. I am satisfied in my own mind that the amended returns are, in all significant respects, accurate and complete.

Very truly yours,

(s) Henry J. Rausch"

Q. From the statements made in the letter of Henry J. Rausch, Certified Public Account, which you have just reviewed, Mr. Shubin, it is apparent that you and your partners and the Vernon Hotel & Restaurant Supply Company, a partnership, received considerable unreported income during the period from November 16, 1942 to the end of the calendar year 1944, totaling a sum of \$141,125.00. Please tell us, if you will, the source of that income?

A. Well, that was an overcharge on meat we sold.

Q. By "overcharge" you mean . . .

A. Above the ceiling price.

Q. You mean by "ceiling price" the stipulated price set by the OPA? A. That's right.

Q. How were these overcharges usually collected from your customers? A. As cash.

Q. In other words, when you sold meat to your customers you billed your meat at the regular ceiling prices by invoices and made collections in cash on the side as overcharges? A. Yes, that's right.

W.A.S.

Q. Do you know whether that was quite a common occurrence during that period of time in the meat business?

(Government's Exhibit No. 50)

A. Well, I couldn't say because what was going on among others, I didn't know. We were running our own business trying to keep our side up—that was the only way to stay in business and we had to collect money on the side.

Q. Did you and your firm do your own slaughtering?

A. No, sir, we didn't do our own slaughtering except in one instance we did have someone kill hogs for us—they bought them and we paid them for the hogs and they killed them. In two or three other instances beef was handled the same way. W.A.S.

Q. The California Meat Supply Company did your slaughtering for you, did they not?

A. They didn't do our slaughtering. They slaughtered beef but they didn't slaughter for us.

Q. Did you or your partners own any cattle?

A. No, we didn't—~~live carcass beef~~, except in several (three or four) instances mentioned in answer to the second preceding question. W.A.S.

Q. Then you did not have to have your own cattle slaughtered and pay overcharges which a number of other companies did where they had their own cattle?

A. No, sir, we never paid any overcharges.

Q. How did you base your sales price on meat that you sold during 1942 to 1944, inclusive?

A. The way we based that is: We were operating as a restaurant supply house or a wholesale house and the OPA gave us a choice there of either going into the restaurant end of it or the wholesale end of it. Whenever the packing house sold hogs they sold them to the retailer but, according to OPA set-up, they had to sell

at $1\frac{1}{2}\text{¢}$ or 2¢ lower than they could sell it to the jobber. So naturally we had the packer on the spot because selling us they were getting 2¢ or $1\frac{1}{2}\text{¢}$ a pound between market and the jobber, which we were called as processors, but we couldn't, in turn, sell this whole hog carcass to the market. To do that, we had to sell at $1\frac{1}{2}\text{¢}$ to 2¢ below ceiling price, so the only way we could sell that hog was to cut it up into fabricated cuts. After we break it up into fabricated cuts the OPA gives a certain price to sell this cut for. One thing they failed to do was to give us a fluctuation on different items. We will say "back fat"—it was $15\frac{1}{2}\text{¢}$ that the OPA based the price on to make us \$1.50 per cwt. on. At that time we had to process the back fat, make pure lard of it, and sell it as pure lard which gave us a 25% shrink to process that real lard and we, in turn, sold it to a house like Proctor & Gamble at 12¢ a pound, which gave us a loss of 4, 5 or 6¢ a pound.

Q. Mr. Shubin, please tell us who collected the overcharges, which were not recorded on your invoices, from your customers?

A. I collected them except in a very few instances when my partners collected them. W.A.S.

Q. What was the usual procedure followed—were the charged that were billed and

W.A.S.

shown on the invoices usually paid by your customers by check and the overcharges by cash?

A. They did pay by cash and check and some all of them by cash.

Q. Who determined the amount of the overcharges to be assessed?

(Government's Exhibit No. 50)

A. Well, they left it up to me to charge the overage.

Q. How did you usually figure out and arrive at the overcharges?

A. Well, the way I charged—if I thought that we can charge less and come out on it—if we were getting a higher price on an item—I mean if the market happened to change and we were getting our right charge on the lard, then naturally our extra charges were small. All we wanted was a fair margin of profit.

Q. Were all your customers charged the same overcharges at the same periods?

A. No, sir, they weren't.

Q. In other words, you usually based your overcharges, I presume, on whatever you thought the market would stand—some of your customers were shown some preference over others at times?

A. Yes, they were.

Q. Who were your principal customers who purchased meats from you and who made these overpayments to you?

A. Well, I can't recollect who the principal customers were—they were so many of them. Many times I wouldn't charge half of them—some of them I would and some I wouldn't.

Q. Can't you name three or four of your biggest accounts?

A. I would have to check the records—it has been so long back.

Q. What record did you keep of the overcharges received?

A. I didn't keep any record except for the first month or two, when we started making overcharges, I would

(Government's Exhibit No. 50)

keep a memorandum of the overcharge for a day or two in those few cases where the customer did not pay on delivery. When such customers paid up (always in a day or two), I would obliterate the customer's name, and when all the customers listed on that page had paid up, I would tear out that page and throw it away. After the first month or two, I had educated all the customers to see to it themselves that they paid the overcharges promptly without any urging from me, which they would do as they wanted to be able to buy more beef.

Q. Did you keep any pocket memorandum showing total collections on overcharges at any time?

A. No, sir, I didn't.

Q. Did you make notations on your invoices showing the overcharges per pound that you made?

A. No, sir, I didn't.

W.A.S.

Q. Were any of your associates or partners or office employees familiar with your actual overcharges?

A. No, I can say that the ones that worked in the office didn't know a thing about it. My partners did know at times, but they were so busy on the other end that they left everything to me.

Q. Were you the partner who designated which customer should receive meat and have (see next page)

W.A.S.

their orders filled?

A. No, sir, we didn't play any favorites.

Q. But you did play favorites as to the amount of overcharges.

(Government's Exhibit No. 50)

A. I didn't play favorites as to the amount of overcharges—I would charge some less and some more, but it was just a matter of charging what I thought was right.

Q. Is it correct to understand from your statement that, for a given period, you charged one customer a certain amount of overcharge and for the same period charged a greater amount to some other customer or customers?

A. Yes, sir, it has fluctuated but that isn't because of favoring one better than the other—we just charged to be charging.

Q. How would you base your overcharges upon repeated orders? Would you trust to your memory as to what you overcharged them on previous sales?

A. No, I collected right there and then as the sale was made.

Q. When the customer returned and made another purchase, how would you base the new overcharge? Would you trust to your memory?

A. Yes, and many times I got fumbled up and was told that I charged less the time before.

Q. What did you do with these funds you collected from overcharges? A. Just put them away.

Q. Where did you put them when you first collected these sums—what was your daily practice?

A. I kept them in my pocket or had a place in the office in a box, or whatever it may be.

Q. Then what did you do with the funds?

A. Well, I would take them home and put them away.

(Government's Exhibit No. 50)

Q. When did you count the funds? What was your usual practice?

A. Well, many times I didn't count the funds for two or three months—just kept it put away. That money I didn't want to touch—I didn't have occasion to get into it and count it.

Q. Did you make any account or statement to your partners as to the amount of your overcharges?

A. Yes, I did. They knew I was overcharging—they knew I had the money. They would ask me, "How do we stand?" and many times I would answer them, "Well, when I get to it, I will check it up and see how we stand."

Q. Your partners had then to trust to you to make some accounting and distribution of these funds which resulted from overcharging? Your partners had no way to
W.A.S.

check on their earnings from overcharges—they had to depend upon you to distribute them; is that correct?

A. I didn't distribute the money. I had the money always.

Q. Do you still have the total funds which you collected from overcharges?

A. No, sir, they were turned in.

Q. You don't have all those funds together in some depository at this time?

A. No, they were turned in on the tax.

Q. You mean then that when you recently prepared and filed amended income tax returns for the partnership and for yourself and your partners that you then went to this depository and drew out some of the funds and paid some of those funds on the tax?

(Government's Exhibit No. 50)

A. When you say, "some of the funds"—everything I had was turned over through Henry Rausch. I showed him every penny I had and we used it up since then.

Q. How much approximately did you have in April or May 1945 when you examined this fund in this depository you had? A. In cash?

Q. Yes. A. I can't answer that now.

Q. Was it in excess of \$100,000.00?

A. No, sir, noways near that.

Q. According to this letter on the stationery of Henry J. Rausch, dated June 27, 1945, the total understatement of income for the period from November 16, 1942 to December 31, 1944, was \$141,125.00. You didn't have that large a sum on hand when you recently made your examination? A. No, sir.

Q. Some of the funds represented by that total had been deposited in your individual bank accounts, I presume? A. Yes, sir.

Q. Had you used some of those funds for your personal living expenses or investments?

A. Yes, we had. When I say that some of the funds were used, I kept all the money at home, then—I mean the money they wanted to use for the business—I kept track of all that. If he wanted to spend some money or my brother wanted to spend some money, I gave them some, and that's the money in their personal accounts.

Q. In other words, you say if your brother wanted some money for some purpose, you would give him the cash and he would have it entered in the books as a new contribution to capital in the business and he would withdraw it for his personal use. Is that correct?

W.A.S.

(Government's Exhibit No. 50)

A. They deposited it in their personal accounts and they spent it through those accounts. There were times that they would spend it when they didn't put it in their personal accounts. They can tell you that better than I can.

Q. Did you make every effort to give all information in your possession to your accountants and attorneys when you got around to filing amended returns?

A. My first bookkeeper, who prepared my original income tax returns and those for the partnership, I did not advise of our receipt of overcharges. However, when Henry J. Rausch recently audited our records and accounts, I made every effort to fully inform him of all the items of income we had received.

Q. Mr. Shubin, do you have any records, or independent recollection, at this time from which you could determine your actual receipts from overcharges during this period, November 16, 1942 until the end of December 1944?

A. No, sir, I have no records, but going over with Mr. Rausch those records and information were given to the best of my recollection and ability.

Q. Mr. Shubin, when your bookkeeper originally prepared the income tax returns for the partnership and for yourself, as an individual, why didn't you tell him of your receipt of additional income in the form of overcharges which you have now disclosed?

A. Well, we didn't want others to know we were running a black market and selling on overcharge.

Q. You wouldn't hesitate to let your own bookkeeper know of it, would you?

A. Yes, I even kept my wife from knowing it.

(Government's Exhibit No. 50)

Q. Yet all your customers knew about it?

A. The customers did—they bought from me—they naturally knew.

Q. Did you have any customers you didn't make overcharges to? A. Yes, I did.

Q. Why didn't you make overcharges to all of them?

A. Because we were looking to the future on business. We weren't there to rob everybody because we figured the business in the future is worth more to us than at the present.

Q. Did your bookkeeper participate in the division of spoils and benefit in any way?

A. He didn't know anything about the overcharges.

Q. Why didn't you tell him about it?

A. I didn't think it was his business to know.

Q. Why didn't you report your total income in your Federal income tax returns that you filed?

A. The reason why I didn't report is the OPA has a law that charges a triple damage

W.A.S.

on the moneys that are collected over the ceiling price and I was afraid that if I did turn it in at that time that all the OPA had to do was to step in and close our doors, which they have authority to do if they find these things are going on.

Q. When you filed your partnership returns for 1942, 1943 and 1944, and your individual income tax returns for those same years, didn't you know that such returns did not reflect all your income?

A. Yes, sir, I did.

(Government's Exhibit No. 50)

Q. And you say the reason you didn't put all your income in was that you were apprehensive that some other governmental agency might learn about it if you reported in excess of what your records showed?

A. That's right.

Q. What occasioned your filing amended returns on July 2, 1945?

A. Well, you see we wanted to make amended returns—not amended returns—I wanted to make returns for the total amount for the last two or two and a half years—in fact since the time we started collecting this extra money. In fact, I even sought legal advice on it and suggested to my attorney that I had some money I would like to turn in and I was afraid to turn it into Internal Revenue because if the OPA ever found it out, I would be out of business tomorrow. I suggested that maybe I should turn it in as gambling winnings. He said I should turn it in but unless you can find the right way, you shouldn't turn it in because you didn't earn it in gambling. He said, "If you want to I will see to it, but you will have to find a right way to turn it in."

Q. Just answer the question, please. What was the motivating reason which caused you to file amended returns?

A. By these discussions with attorneys,—I finally run into—I was with him for a year, Mr. Grossman. I was talking to him one morning and I said, "Henry, if I could properly turn the money in that I had as overcharges, I would do it tomorrow if I knew the OPA would not close my doors and the Internal Revenue don't go to OPA and show what I turn in." He said, "Do you mean it?",

(Government's Exhibit No. 50)

and I said, "Yes, I have tried for two years, since I have been collecting, but I don't know of any way that I can turn it in and yet be safe from OPA." He said he thought he knew someone that can answer that question for me. He left on his vacation for about ten days or so and when he came back he took me over to Mr. Brady's office and that's how I happened to turn it in.

Q. Mr. Shubin, did you know when you first contacted Mr. Brady, or his office, on or about April 25, 1945, that Government agents had started to check your associates and tenants in the building you occupied in a black market investigation to determine whether they had received income from black market operations?

A. The OPA has been at my place and checked my books and gave me a clear bill prior to that. That's the thing I know.

Q. My question, Mr. Shubin, is this: When you first went to Mr. Brady's office on

W.A.S.

or about April 25, 1945, did you then know that internal revenue agents had been checking other tenants of the same building that you have occupied in an effort to determine whether they—the other tenants—had been engaged in black market operations and had received unreported income?

A. No, I did not know, but I am informed that the date should be May 14, 1945, not April 25, 1945. W.A.S.

Q. Do you know Charles King?

A. Yes, sir, I do.

(Government's Exhibit No. 50)

Q. He is connected with the California Meat Supply Company in the same building where you are a tenant; is that correct?

A. Yes, but the name of Mr. King's company is Southern California Meat Co. W.A.S.

Q. Did you know Hyman Stillman?

A. Yes, I have known him since he has been in that building.

Q. Did either of those gentlemen advise you that they had been contacted with reference to any unreported profits from black market operations that they had information about prior to the time you contacted Mr. Brady?

A. No, sir.

Q. Did either of those gentlemen or their associates or employees advise you that an income tax investigation was under way pertaining to tenants of the building?

A. No, sir, they did not.

Q. Then it is your statement that, based on Mr. Grossman's advice, you followed through with your endeavor and your intention to file amended returns and did, independently, contact Mr. Brady through him?

A. Yes, sir, I did.

Q. Going back to these overcharges, what was the customary method by which the customer paid you these excess amounts which were paid in excess of the invoice price for the meat?

A. They gave it to me as cash.

Q. Where was it usually given to you?

A. Either we went to the back room or on the side in the cooler—different ways where the others couldn't see it.

(Government's Exhibit No. 50)

Q. Did you usually wear one of those long, white aprons with big pockets? A. Yes.

Q. Was that a way of collecting by the customer depositing the money in the pockets?

A. No, not necessarily. I didn't keep it in the apron pockets, no, sir.

Q. Did you keep any record of these overcharges by week or by month? A. No, sir, I did not.

W.A.S.

Q. You kept some of the funds in the office for periods of time—a week or month?

A. Sometimes three or four days then I would just take it home in a chunk—maybe in an envelope—maybe I didn't open the envelope for four months.

Q. Did you ever accept checks in payment of overcharges?

A. No, sir, I don't recall accepting checks.

Q. Did you demand cash? A. Yes, sir.

Q. Were the overcharges paid to you in lump sums or so many dollars and so many cents, or just how?

A. So many dollars and so many cents—whatever the overcharges were they gave it to me.

Q. How did you compute your overcharges—so much a pound or so much a cut?

A. Yes, at times yes, and sometimes no. When they bought the merchandise I would just tell them, "You owe me so much," and they would give me what I asked.

Q. Did you make any effort to collect the overcharges in any particular denomination of bills—large bills?

A. No, sir, I did not.

(Government's Exhibit No. 50)

Q. When you filed these amended returns then and had your accountant make his examination recently, did you allow him to make a physical inventory of your assets—did he count the bills?

A. No, sir, I counted and told him.

Q. Then did you turn in this roll of bills or volume of currency—did you convert it into cashier's checks or make deposits?

A. I made deposits of it in our business.

Q. Then if any of the funds were embezzled or misappropriated during the time they remained in your office, you wouldn't know it and such funds wouldn't have been reported?

A. No, I had my fingers on it—no one knew where it was.

Q. Then you are satisfied that the totals you have reported on the amended returns are the correct totals of previously unreported income; is that correct?

A. Yes, sir.

(Mr. Phoebus questioning)

Q. In your original partnership agreement between you and your brother and Mr. Kissel, what agreement did you have as to the division of profits?

A. 33 1/3, 33 1/3 and 33 1/3.

W.A.S.

Q. Did Mr. Kissel invest quite a substantial amount of money in the business?

A. Well, when we went into the business, I don't think the business was worth over \$3,000.00.

Q. Did Mr. Kissel invest \$1,000.00 of that?

(Government's Exhibit No. 50)

A. What the arrangement was the books will show what he invested.

Q. Did he bring with him any great experience or skill in the meat industry?

A. He worked for me for almost eight months with the idea that he will go into business with me as soon as the opportunity came up.

Q. Is he related to you?

A. Yes, my brother-in-law—married to my wife's sister. It's my wife's brother-in-law.

Q. Was there every any discussion of a different ratio of dividing profits?

A. We thought we would make it on a different ratio. When we went into partnership, I wanted to hold 51% of the business. They argued the fact that what can I do that I should hold the value of 51% because they were young—my brother was younger than me and they knew one thing that kept this business going was the employees. We worked from four in the morning until eight or nine o'clock at night. They argued that if it wasn't three ways it wasn't fair, so we agreed to that. It wasn't the money involved because the company didn't have much money to start the business.

Q. What did Mr. Kissel do before he worked for you during this eight month period?

A. He was with Dr. Pepper Bottling Works.

Q. In regard to the price you paid for meat to packers from whom you bought, was all your meat bought in strict accordance with OPA prices?

A. Yes.

Q. You never paid anything on the side in cash?

A. No, we were in no position to have to pay.

(Government's Exhibit No. 50)

Q. Meat was at a premium, witness the fact that you were able to obtain extra charges from your customers. Why didn't you have to pay it, in turn, to persons from whom you got meat?

A. We put the packers on the spot by going into the type of business they didn't want to go into—fabricating and cutting. At the present time we bone 130,000 pounds of Government boneless beef, which we run second to Cudahy and at times more than their production per week. The packer is in no position to bone beef and say if he doesn't bone beef the OPA says they cannot kill it, so the packers look to us to bone their beef and we, in turn, demand civilian supply with it.

Q. This situation prevailed throughout 1943 and 1944?

A. Yes, we were cutting hogs then—the packers didn't want to. We were offered by

W.A.S.

a Mr. Callahan from Post Packing Company for two car-loads 2¢ below ceiling and I refused him.

Q. You gave us the information that you kept no books or records on these extra charges that you had made. However, in discussing the question of cash that you had given to your brother at various times you used the phrase, "I kept track of the money." How did you keep track?

A. They put the money in the bank—their personal accounts—and they bought items. They only asked me for money when they bought large items and I knew what they spent. I knew what he took.

(Government's Exhibit No. 50)

Q. The funds from these overcharges were used by the various partners and their wives to purchase the apartment house and not the partnership as a firm?

A. Yes, sir.

Q. Where did your wife, for example, understand the funds came from to purchase this apartment house?

A. She never questioned me where the funds came from to purchase the apartment house. We deposited the money into the company and, in turn, wrote checks to ourselves as a drawing and bought the apartment house.

Q. So it is true then that your wives did not know the origin of these funds?

A. No, they did not.

Q. You referred to the fact that from the beginning when you started to collect these overcharges you consulted your attorneys as to the manner and means of reporting this income. Do you care to disclose the names of these attorneys?

A. Yes, sir. Mr. Brady asked me if I can testify—if I can show someone or bring someone to show that I did discuss turning in these funds and I didn't at the time, but I went to my attorney and I told him what I have done and that I didn't tell Mr. Brady that he was the one—that we discussed this—and he felt insulted. He felt what he discussed with me was in no way incriminating. I discussed it with Mr. Del Valle of Arnerich, Del Valle & Sinatra.

Q. Is Mr. Grossman an attorney?

(Discussion off record.)

A. Yes, but has never practiced law as such, but I didn't know he was an attorney until just this moment. (Mr. Schlick questioning)

(Government's Exhibit No. 50)

Q. Mr. Shubin, when did you first hear that investigations by the Internal Revenue were in process along the boulevard down there?

A. Well, I can't answer that.

Q. Can you associate it with any event?

W.A.S.

A. I can't tell you the first date I heard they were around.

Q. Can you associate it with some event or happening or having seen somebody?

A. I haven't seen anyone. I saw you fellows walk in one day and Mr. Walsh was there—the OPA fellow—and I saw you walk in sort of important—you looked important—and I asked him, "Who are the people?" and I saw him wave at you, I think, and he said, "Just some fellows I know." That's the first time I saw you people. Then when you came back I remembered seeing you and I said, "Oh, yes, I saw you before," and I recollected I saw you before.

Q. My reason for my question was that when we first met you formally you said, "I know who you are—I have seen you before."

A. That's when this Walsh told me—I didn't know it until later and I said, "I know who you are."

(Mr. Bircher questioning)

Q. Mr. Shubin, was the date that you first saw these gentlemen before you went to Mr. Brady?

(Government's Exhibit No. 50)

A. That I really don't know. I can't recollect whether it was before or after. I didn't know who they were at the time and then I saw them come back at a later date. I know I had—I spoke to Mr. Grossman. At the time I first saw them, I didn't know who they were—I thought they were OPA officers. They were buzzing around and checking the books.

Q. Your amended returns had been mailed prior to the time the Internal Revenue representatives called on you formally; is that correct?

A. Yes, sir. I knew that Mr. Phoebus and Mr. Schlick were Internal Revenue representatives only a short time before they formally called on me about July 5, 1945.

Q. Do you have any other statements you care to make on the record, Mr. Shubin?

A. I can go through our records and find bills that I have made at times where I thought it was safe to put the money into the business as fictitious invoices—make a dummy invoice—and threw in maybe \$500.00 or \$1,000.00. In fact, many times when the money was laying in the office, I would take and make a fictitious invoice on things that didn't have any point value, such as pigs' feet or back fat. I would put as much money into the company as I thought it would be safe to, and at one time we ran a market for two months which we only made, I believe it was \$1,500.00 and I made a return on that market of \$12,000.00, which was really a ridiculous profit for the

(Government's Exhibit No. 50)

income, I know, was \$8,000.00 a year or so. I did that because I did want to return the money and every place I thought that it was safe and not have the OPA walk in and close my doors, I put the money in. I have known Del Valle and Sinatra since the first time we started business, probably four or five years ago. We started as Johnson & Shubin then and Johnson knew Sinatra and introduced me to him and I called on him frequently and especially when we started collecting overcharges, and I figured, as attorneys, that they weren't compelled to give out any information that I might give them and I spoke freely with them.

W.A.S.

I told them that I have overcharges that I would like to turn in if I knew that OPA wouldn't close our doors and, in fact, at one time my brother played poker and I played poker—I don't play in a big way—but I said, "I can say I won it in poker or horse racing" and he discouraged me. They advised me I should turn it in but I didn't know how but I found the answer when I met Mr. Grossman. I mentioned it to him and told him I was sorry that I didn't mention it to him at the time I talked to Del Valle. He said, "Well, it's one of those things, but if you are sincere I will try to help you." I said, "I'm not trying to hide anything—I am talking to you as a friend." I had spoken to Sinatra and Del Valle several times and they discussed this problem to see what they

(Government's Exhibit No. 50)

could do to help me, but they couldn't find the answer. Del Valle told me when I told him I got Mr. Brady, he says, "That's the party I wanted you to get connected with and in a round-about way I was trying to get Brady to work on your case." He said, "You can't find a better man to know what to do on your case." I think the first time I talked with Del Valle was prior to the time I filed my original 1942 return.

The first day I came to your office, Mr. Brady, you called Washington and talked to Mr. Mooney and asked Mr. Mooney whether the OPA works with the Internal Revenue or whether the Internal Revenue works with OPA. Mr. Mooney says, "To my best recollection to date the Internal Revenue does not work with OPA, but after that date they do not promise anything." He said he would make inquiries on it and get the information and give it to Mr. Brady and two or three days later we did get a report on it.

Q. Mr. Shubin, when you filed your partnership returns for 1942 to 1944, inclusive, and your individual income tax returns for those same years, you knew, did you not, that both the net income and the income tax liability were understated? A. Yes, sir.

Q. To whom did you consider the funds belonged which you had in a separate depository and which were the proceeds of your overcharges?

A. To the Government.

(Government's Exhibit No. 50)

Q. Did you consider that all of these overcharges belonged to the Government or only the tax on the overcharges? A. The tax end.

Q. Did you make an effort, Mr. Shubin, to keep in a financial position so that you could pay the tax on the overcharges when you got around to filing amended returns?

A. Yes, sir, I did. As an illustration by the fact that when we bought these apartments, we borrowed \$20,000.00 on it and the total price was \$48,000.00 and we figured that, in case the OPA did step in, we can show that through the years that I have been in business—I have been in business since I have been married, 16 yrs., and I thought if the OPA walks in and asks where I got this \$28,000.00, I could have told them I could raise \$28,000.00 but above that I figured the OPA can step in and penalize us, so we borrowed the difference between \$48,000.00 and \$28,000.00.

W.A.S.

We borrowed money from our customers, which is an OPA violation and then we borrowed money from the bank again—the Government always holds back on this new Government boning program to the amount of \$130,000.00 which causes us to borrow money to keep this business going. We did pay loans—in fact, I told OPA that the price that they stated on our boning program that they did not include money borrowed and I told them, “I am

(Government's Exhibit No. 50)

borrowing money—it is costing me so much a month—why don't they give me a set price to offset this to cover the interest?" I signed notes when I borrowed money and paid interest. There are times that we could have made a lot of money if we gambled with this money, which we wouldn't have unless it was a sound investment like the apartment. We used it in inventory when we cut a lot of hogs.

Q. Mr. Shubin, have all your statements been given truthfully and voluntarily?

A. To the best of my knowledge.

Mr. Bircher: When this statement is completed, we will ask you and your representatives to read and review it and you may correct it and sign it.

I have carefully read the foregoing transcript of my testimony, pages 1 to 23, and state it is a true and correct transcript, and that the answers to the questions propounded therein were given freely and voluntarily on my part.

William A. Shubin

Subscribed and Sworn to before me this 13 day of August, 1945.

Samuel J. Phoebus

Special Agent Bureau of Internal Revenue

Case No. 18367Cr. Gov. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 50 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

[GOVERNMENT'S EXHIBIT NO. 51]

[For identification only; not received in evidence]

VOLUNTARY SWORN STATEMENT OF MR. FREDERIC ALEXANDER SHUBIN, TAKEN IN ROOM 844 U. S. POST OFFICE & COURT HOUSE, LOS ANGELES, CALIFORNIA, JULY 24, 1945, PARTIES PRESENT BEING MR. SHUBIN, HIS ATTORNEYS, MR. JOSEPH D. BRADY AND MR. STANLEY C. ANDERSON, SPECIAL AGENTS WALTER E. SCHLICK, SAMUEL J. PHOEBUS AND DONALD O. BIRCHER. STENOGRAPHER OUIDA DUDNEY

(Unless otherwise indicated, questions are propounded by Mr. Bircher and answers made by Mr. Shubin.)

Q. Mr. Shubin, are you here today with a view to making a voluntary sworn statement relative to your income tax liabilities relative to the years 1942, 1943 and 1944? You are ready to tell us what you know about your tax matters? A. Yes, sir.

Q. Will you raise your right hand and be sworn?

A. Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God? A. I do.

Q. You are advised, Mr. Shubin, that any testimony you give here or any documents which are produced at this interview may be used by the Government in any subsequent proceeding, and that you have the right to refuse to answer any questions if you desire to that you feel might tend to incriminate you. Do you understand that, or do you want your attorneys to explain that?

A. No, I understand that.

(Government's Exhibit No. 51)

Q. With that you are ready and willing to proceed and give us any information relative to your tax liability?

A. Yes, sir.

Q. Will you please state your name and present address?

A. Frederic Alexander Shubin, 2767 Laurel Place, South Gate.

Q. And your age, Mr. Shubin, and where you were born?

A. Thirty years old; Los Angeles, California.

Q. How far did you go in school?

A. Graduated from Roosevelt High School.

F.A.S.

Q. You are one of the partners, I believe, in the Vernon Hotel & Restaurant Supply Company, is that correct?

A. Yes, sir.

Q. Please state the names of your partners.

A. William A. Shubin; Jack L. Kissel.

Q. Who is William Shubin, and how old is he?

A. William Shubin is my brother, and he is thirty-six years old, I think.

Q. He was born in the United States, was he?

A. Born in Los Angeles.

Q. And Jack Kissel—how old is he and where was he born?

A. He was born in Los Angeles, and I think he is twenty-six.

Q. In order to shorten your statement and the record here, Mr. Shubin, I will ask you to glance over a copy of a letter written by Mr. Henry J. Rausch, C. P. A., dated June 29, 1945, with reference to his examination of

(Government's Exhibit No. 51)

the income tax liability of the partnership Vernon Hotel & Restaurant Supply Company, and will ask you if the statements contained in Mr. Rausch's letter are true, to the best of your knowledge and belief, so that the same letter can be made a part of this record as being your statement? A. Yes.

Q. We will ask that that letter be incorporated in your statement, and the answers and representations therein be incorporated in this statement as your answers, to the best of your knowledge and belief. A. Yes, sir.

Q. Mr. Shubin, there were certain overcharges, that is, so-called black market charges, or charges in excess of OPA ceiling prices made by your firm, the Vernon Hotel & Restaurant Supply Company, during 1942, 1943 and 1944, is that correct? A. Yes, sir.

Q. Who collected those overcharges from customers?

A. It was handled by my bother and Jack, and at times by myself.

Q. Were the overcharges always collected in cash, or did you sometimes get checks?

A. I would say probably 99 per cent of them were in cash.

Q. By overcharges you mean moneys were collected from your meat customers in excess of the OPA ceiling prices and in excess of the meat prices?

A. It would be in excess of the invoice price because the invoice price would not F.A.S. be in excess of the OPA price.

F.A.S.

(Government's Exhibit No. 51)

Q. You say that you sometimes collected some of these overcharges from customers?

A. If it would be, it would be very small because my end would be the general management of the plant.

Q. Whenever you did happen to collect overcharges from customers, what did you do with the funds?

A. I turned them over to my brother, Bill, or to Jack, who in turn would turn them over to Bill.

Q. What did they do with the funds, if you know?

A. Bill had that money set aside and he kept track of it at all times.

Q. Where would he keep the funds when they were first collected? A. That I wouldn't know.

Q. You were one of the partners, and as an interested partner in these funds, wouldn't you make it your business to see how much was collected each day or each week and where those funds were kept?

A. To be frank with you I didn't, because I have implicit faith in my brother, because whatever he would say about the business would be all right in my eyes and usually anything I would say would be all right in his eyes.

Q. Didn't you ordinarily help your brother count these funds? A. I did at times, yes, sir.

Q. Didn't you make records of how much money was accumulated in these funds or depository?

A. I left that up to my brother.

Q. At all times during this period from 1942 to 1944, inclusive, did you attempt to keep yourself fairly well in-

(Government's Exhibit No. 51)

formed as to the total amount that was being built up by this fund of overcharges? A. Yes, sir.

Q. What interest did you have in this fund? How much of it did you own?

A. Any money taken into the company regardless of whether it be through the normal channels or the illegitimate channels, would go into the partnership.

Q. What was your interest? A. It was 33-1/3.

Q. That is, you and your brother and Mr. Kissel each owned one-third interest in the regular interest in the partnership, as well as the overcharges received by the partnership? A. Yes, sir.

F.A.S.

Q. When you filed your individual income tax returns for the years 1942, 1943 and 1944, didn't you realize that your income tax returns understated your actual total net income and your total tax liability for each of those years? A. I did in all but the year 1942.

Q. What is your answer again, and tell us what you mean?

A. I did in the years 1943 and 1944, but as far as 1942 is concerned, I left that up to my brother and the bookkeeper, and thought that had been taken care of.

Q. Your answer is, then, that when your 1943 and 1944 individual income tax returns were prepared and filed you realized that your net income, as well as your income tax liability, was understated on the original income tax returns, is that correct? A. Yes, sir.

Q. Why didn't you report your net income and full tax liability in the years 1943 and 1944?

(Government's Exhibit No. 51)

A. At that time the OPA was a very powerful factor, and if we did report it, it would show an excessive profit according to the stipulated percentage of profit that you are supposed to derive from the sales, and at all times we had internal revenue in mind, and if at any time possible that there wouldn't be any reflection of the OPA in putting us out of business, we were ready to make our return, and we conferred with our attorneys on that and we finally found the answer in Mr. Brady's office, and in 1945 made an amended return.

Q. Did you discuss the amount of overcharges that you received or that your partnership received during 1942 to 1944, inclusive, with your brother, William Shubin, on numerous occasions during those years?

A. You mean excess profits?

Q. Yes.

A. Yes, that was quite a problem. In what way do you mean receipts?

Q. During those years did you discuss with your brother on several occasions the fact that you were collecting overcharges from sales?

A. Yes, we did. As the money came in the big problem in our mind was how could we report it in our income tax without any reflection in the OPA. I want to make myself clear on this point. Here we were in business. With all the restrictions governing our business from the OPA we couldn't very well put the money into the business without them charging a higher price because the OPA had their ceiling prices. So our discussion at all times was how could we get it into the business to settle with the internal revenue. I will say this—supposing if

(Government's Exhibit No. 51)

we had taken \$200.00 in excess of the amount of the bill, and we wanted to build up the amount of money that we had—what I am simply trying to say is this, in simple English, the

F.A.S.

money derived from the black market operations we wanted to show in the business, so we could pay our income tax on it, so that was part of our discussion at all times about that surplus money.

Q. What disposition was made of these excess charges that were collected? Where were they kept? What record was kept on them?

A. As I said, my brother Bill kept track of all of that.

Q. Did you on occasions prepare fictitious invoices covering sales of goods in order that some of the funds represented by these excess charges could be projected into your business as additional income—taken into your business?

A. My brother, William A. Shubin, made up most of the fictitious bills. If I did, I made up a few, but I can't recollect how many.

Q. Did you ever seek legal advice prior to 1945 with reference to reporting these excess charges you made in your income tax returns?

A. Yes, sir, we asked the advice of our attorneys.

Q. Whose advice did you seek?

A. Mr. Del Valle and Mr. Sinatra.

(Government's Exhibit No. 51)

Q. What advice did they give you with reference to reporting those excess charges?

A. We thought that—we used one example that supposingly we could take it in as poker winnings, gambling or horse racing winnings, and he said that it would not be a very good idea because of the fact that that money had not been derived from horse racing winnings or poker winnings, and it would stand out like a sore thumb at the OPA.

Q. Who gave you that advice, Mr. Sinatra or Mr. Del Valle, or both? A. Mr. Del Valle.

Q. What occasioned your filing of amended returns for the years 1942 to 1944, inclusive, which were filed in Washington, D. C., on July 2, 1945? What occasioned you to have amended returns prepared this year?

A. As I have stated before, since these black market operations and the meat picture tightening up as it had, that had been paramount in our minds at all times to file, but because of the OPA being such a big factor in it we didn't have the logical solution, so we got some advice.

Q. Did you know prior to the time you contacted Mr. Brady's office in April or May, 1945, that income tax investigators had started to work making investigations regarding black market profits of other tenants in the same building where you had offices at 3301 East Vernon Avenue, Los Angeles?

A. I will definitely say that we had already contacted before F.A.S.

Mr. Brady ~~from~~ the first time I saw these two gentlemen at the Southern California office. We had already gone to work on it.

F.A.S.

(Government's Exhibit No. 51)

Q. Will you answer the question, Mr. Shubin? At the time you first contacted Mr. Brady's office, at that time did you know that any Government income tax investigators had already started to make investigations of other tenants in the same building that your firm occupied?

A. No, sir. The question is, roughly, that prior to the time we had gone to Mr. Brady's, had we known there was an investigation going on of the tenants in the building, is that it?

Q. Yes. A. No, we hadn't.

Q. During the time that your accountant, Mr. Henry J. Rausch, was making his audit and examination of your income tax liability and that of your partnership during the last two or three months, did you furnish Mr. Rausch with all the information in your possession relative to overcharges that you or your firm had received for his information and use in preparing amended returns?

A. Yes, sir.

Q. You gave him all the information you had?

A. All the information that we had.

Q. Was any favoritism shown by them to customers when overcharges were made against them. That is, were some charged more than others when they purchased meat?

A. Well, the meat situation is what you would say a very complicated picture, as anyone will tell you, at certain times of the year. The situation was thus. At times—it was just a case of supply and demand, that's the easiest way to answer. When the supply was great you would sell below the ceiling price—just what you would call a fair profit to you.

(Government's Exhibit No. 51)

Q. Then, so far as you know, you kept all of your customers the same at one period?

A. That I couldn't say, because Bill was handling the money practically most of the time.

Q. Can you say that as far as you know now, uniform overcharges were made against all your customers during the same period, is that right?

A. There wouldn't be such a thing as a uniform price. It would probably vary from one month to another month.

Q. At the same period, were the same overcharges made to all customers who bought meat from you?

A. That I couldn't say, because Bill handled all the money.

Q. Your answer is you wouldn't know?

A. That is right.

F.A.S.

Q. How were your overcharges based, so much per pound, per cut? A. Per poundage.

Q. Tell us how the overcharges were, on different grades of meat? A. That I couldn't say.

Q. How much is the greatest sum that you ever remember collecting in overcharges from any one customer at one time?

A. I would say it would average—would that be over a period of time?

Q. How much is the greatest sum you ever collected at any one moment?

A. You mean from any customer, regardless? The greatest amount that I ever collected was 2¢ per pound.

(Government's Exhibit No. 51)

Q. In dollars, how much was the greatest sum you ever collected at any one time from any customer?

A. I will say the most I ever remember would be \$100.00 at the most.

Q. Did the customers, so far as you know, usually pay for the invoiced goods by check and overcharges by cash?

A. Yes, sir.

Q. Where were these overcharges accumulated during this long period of time from 1942 to 1945?

A. You mean where were they kept?

Q. Yes, where were they built up? In a can, or a drawer, or a box?

A. No, it was kept at my brother Bill's place. He kept them.

Q. Where did he keep the funds, do you know?

A. I wouldn't know. I never questioned him. In fact, I couldn't even say it was at my brother Bill's place. I would say it was in Bill's possession at all times.

Q. Did he keep you currently advised as to how much that fund totaled at different times? Did you know how much the fund totaled at any time?

A. The thing that was paramount in our minds at all times, we kept it set aside, Bill and I—we said that money received from black market operations wasn't rightfully ours, it belonged to the Government. When they took their money out of it, when we had an opportunity to pay without hurting ourselves, we would pay our just taxes.

(Government's Exhibit No. 51)

Q. You realized at all times that you had an unsatisfied income tax liability based upon the fact that your income tax returns had been understated as to net income and as to tax liability? You realized that the Government might come along at any time and ask you to pay additional taxes?

A. We realized this, that we had to pay the Government what was due them, and as soon as the OPA regulations would permit us to make an out and out declaration we would do that, which was proved by our conferences with the attorneys.

F.A.S.

Q. Did you attempt in any way to have entered in your regular books of account any of these black market profits, and if you did so attempt to report any such items of income, please tell us in what manner you did so?

A. Well, we took over a market, I think it was for a period of two months, and it gave us an opportunity to report some of this excess money without any reflection from the OPA because it was a market operation, so Bill put it in as market earnings, and then from time to time, whenever the opportunity presented itself, Bill would make falsified petty case sales, to build up the income of the business. An example of that would be he would take a bill and probably use the name Joe Brown, and write out a sale of \$300.00 or \$400.00, no stipulated amount, and bring that into the business that way, be-

(Government's Exhibit No. 51)

cause we didn't figure any reflection of the OPA on that. The owner of the market was in bad health and he wanted to take off, so we took over the market, handled the sales and such, and put merchandise from the Vernon Hotel and Restaurant Supply into the market. And then we padded the sales, I would say, to about \$10,000.00 in the two-month period, and that went in as an income of the Vernon Hotel & Restaurant Supply Company, which gave us an opportunity—that was one of our best opportunities to put money into the business without any reflection of the OPA. One thing I want you to understand, Mr. Bircher. The paramount thing in my brother Bill's mind, my mind and Jack Kissel's mind was how could we get that money into the business and still not cause any action from the OPA, because the internal revenue had to be paid, but how could we pay it and still remain in business, and I could honestly say that Bill and I and Jack found the solution in Mr. Brady, and it's a big load off my mind.

Q. What interest does Jack Kissel have in the partnership, and what are his duties?

A. Jack Kissel is a one-third partner in the business, and his duties consist of—he started in a new boning process upstairs, boning beef for the Government, and now we are cutting hogs for the Government. He has taken over the cutting of hogs and in the past his duties have been distribution.

Q. Did you have an agreement with your other two partners that you each were to share equally in the legal

(Government's Exhibit No. 51)

profits as well as the illegal or black market profits during those years 1942 to 1944, inclusive? A. Yes, sir.

Q. Have all your answers been given voluntarily and been the truth of the best of your ability today?

A. My answers have, but I will admit that you had me confused in many instances.

Q. Your answer is that your statements have been given voluntarily and your answers have been given truthfully to the best of your ability today?

A. That is right.

F.A.S.

I, Frederic Alexander Shubin, hereby certify that I have carefully read the foregoing transcript of my statement, and that my answers to the questions herein are, to the best of my knowledge and belief, true and correct.

Frederic A. Shubin

Subscribed and sworn to before me this 20 day of August, 1945, at Los Angeles, California.

Samuel J. Phoebus

Special Agent

~~Frederic A. Shubin~~

Case No. 18367 Cr. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 51 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

[GOVERNMENT'S EXHIBIT NO. 52]

[For identification only; not received in evidence]

SWORN STATEMENT OF MR. JACK L. KISSEL,
GIVEN IN THE OFFICE OF THE INTELLI-
GENCE UNIT, BUREAU OF INTERNAL
REVENUE, ROOM 844, U. S. POST OFFICE
AND COURT HOUSE, LOS ANGELES, CALI-
FORNIA, AUG. 1, 1945.

Present:

Donald O. Bircher, Special Agent

Samuel J. Phoebus, Special Agent

Joseph D. Brady, Attorney for Taxpayer

Staley C. Anderson, Attorney for Taxpayer

Gladys M. Callaway, Stenographer

(Questions propounded by Mr. Bircher unless otherwise indicated.)

Q. Mr. Kissel, are you ready and willing to give a voluntary sworn statement at this time relative to your individual income tax liability and relative to the business and income of the Vernon Hotel & Restaurant Supply Company covering the years 1942, 1943 and 1944?

A. Yes, I am.

Q. Will you please raise your right hand? Do you swear to tell the truth, the whole truth, and nothing but the truth in this examination, so help you God?

A. I do.

Q. Please state your full name and present residence address?

A. Jack L. Kissel, 1525 Nairn Avenue, Los Angeles, Zone 22.

(Government's Exhibit No. 52)

Q. You are advised, Mr. Kissel, that you are not required to incriminate yourself; and that you have a right to decline to answer any question you feel might tend to incriminate you. Do you understand that or do you wish your attorneys, Mr. Brady and Mr. Anderson, to explain that to you?

A. Yes, I would like them to explain it.

(Discussion off record.)

Q. You understand then now, since your attorneys have explained your rights, and are you willing to proceed? A. I am.

Q. Mr. Kissel, please tell us when you first became connected with the business known as the Vernon Hotel & Restaurant Supply Company of Los Angeles?

A. As an employee or as a partner?

Q. Any way—the first date you became connected with that company and in what capacity.

A. The first part of 1942 as an employee.

J.L.K.

Q. What was your compensation to start with?

A. Well, I got \$5.00 a week and meat. I just delivered in the mornings—I wanted to learn the meat business. I had two jobs—I worked at Young's Market Company. I worked from two or three o'clock in the morning until seven and then would buy my breakfast and then went to work for Young's market. I was a salesman there.

Q. When did you first become a partner?

A. After this, I became a full-time employee—I quit Young's—I could see no future in it. That was the latter

(Government's Exhibit No. 52)

part of May or first part of June—first week of June, same year—and then in November I became a partner.

Q. How did you become a partner? Did you make a contribution to capital?

A. No, we paid the former partner off and what was in the company just stayed in the company. There was nothing contributed towards the cash of the company. The outstanding bills and everything there, they just stayed right in the company and we took our share over. I paid the retired partner \$700.00 or \$800.00, I believe.

Q. Mr. Kissel, you are acquainted, I believe, with the fact that amended income tax returns were recently filed by you and by the partnership, Vernon Hotel & Restaurant Supply Company. Do you know that to be a fact?

A. Yes.

Q. Tell us why those amended returns were filed? Do you know what income was reported therein that had not been previously reported?

A. You mean the figure that we used as an amended return?

Q. Yes, what was the source of that additional income shown on the amended returns?

A. The amount of money that Bill collected in addition to what was put on the bills, and the figure was derived by Mr. Rausch—he went through all the money we spent. It was an extensive amount of data he had gathered. He worked two or three months, I think, and he said this was about the most accurate figure he could get.

Q. Is it correct to understand that the additional income reported in the amended income tax returns filed

(Government's Exhibit No. 52)

by you and your partners resulted from overcharges, or sums collected in cash, in excess of OPA ceiling prices?

A. Yes.

Q. Who kept a record of those items of income during the years 1942, 1943 and 1944?

A. There was no record kept that I know of. I never knew for three or four months at a time what money we had unless I asked Bill.

Q. Did you ever see him count the money?

A. No, I really never knew where it was. Fred and I trusted Bill implicitly but I was afraid if he ever got killed we would never know where it was, and he was afraid if we got into a

J.L.K.

party, I would brag about it.

Q. In the year 1942, after November 16th, what partnership interest did you have in the Vernon Hotel & Restaurant Supply Company?

A. Well, to begin with, Bill wanted the bigger share and Fred and I both disagreed with him—it was a topic of discussion. We sat down at the table at Bill's house—he wanted 51% and we disagreed with him at the time, and the fact that I was a little bit "green" in the business, Fred thought maybe I should get the least amount. Fred continually maintained that he should have received more in the business than I did, so finally he almost convinced Bill to that extent because I had not too much knowledge of the business. Then they decided to finally definitely draw a partnership agreement that I had refused to sign, and, after further discussion, which had been going on for quite some time, they definitely decided for a three-

(Government's Exhibit No. 52)

way partnership. At the time there was no capital involved—it was purely physical labor the three of us was putting in and I happened to be putting in as much labor as they were. I had complete charge of the over-all production of the business and I thought I should have one-third and we mutually agreed among ourselves that it should be one-third.

Q. You each were equal partners then?

A. Yes. Bill had \$1,400.00 in it and Fred and I had \$600.00 or \$700.00 apiece, and then we started in the hog business.

Q. In November 1942?

A. No, the first part of the following year.

Q. Mr. Kissel, the original partnership returns for the period November 16, 1942 through December 31, 1944, showed a total net profit of \$104,452.61, not including the period from November 16, 1942 until December 31, 1942, whereas the amended returns for the entire period from November 16, 1942 to December 31, 1944, report a total income of \$245,577.61, or a total additional income reported in the amended returns of \$141,125.00 not reported in the original returns. Is it your opinion that the total additional income reported in the amended returns resulted from the receipt of overcharges, or charges in excess of OPA rules, which were collected and which were not recorded in your books or reported in your original returns?

A. As a result, yes.

Q. Do you know, Mr. Kissel, whether any of these overcharges were reported in your original returns under some other guise on fictitious invoices which were prepared and sandwiched in with your regular invoices?

(Government's Exhibit No. 52)

A. I know definitely as a fact that fictitious bills had been made with money turned into the company.

Q. Do you know why they were made?

A. We wanted to put it in the business and declare our income tax so that we could use the money right in the business. It was always a discussion with us as to

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how we could take and bring the money out in different bills. Bill had me going crazy many times when we would build up the money and he would worry about how to put it in and we would make up bills, but I always tried to stay out of it—I was in the production end.

Q. What do you know about a market which was operated by your partnership for a short period?

A. It was Cliff's Market and we took it over, I think, for two or three months, or a month—I don't remember the amount of time. We worked there when we had a chance to help out the fellows and I knew that was one of the ways we threw in extra money. We threw in \$10,000.00 or \$12,000.00—it wasn't exactly a profit from the market but actually cash that Bill had on hand that he declared as a profit from the market.

Q. From what source did Bill Shubin obtain the \$10,000.00 or \$12,000.00 which he added to the actual profits realized by the market?

A. From overcharges. In actuality the market made about \$1,500.00 to \$2,000.00 profit and this was a chance for us to declare what extra money Bill had for income tax, so we declared that amount in addition to the profits of the market.

(Government's Exhibit No. 52)

Q. Why didn't you and your partners show all these black market profits right on your books and records and invoices in accordance with your actual receipts from meat sales?

A. Well, we were always afraid of the OPA, and in making out these fictitious bills you could only put in so much because if you went into excess over what they allowed you, it would show immediately on your books at the end of a month's time, so Bill could only keep putting in what he figured would be a rather nominal sum so that it did not look ridiculous at the end of the month.

Q. Why didn't you report the full amount of your net profits at the end of each year on your individual income returns regardless of whether you showed the full amount on your books and records?

A. For the same reason. We never did know how to declare it and Bill always said if we did, OPA would step in and close our doors. We thought that anything that we declared would also be known to the OPA and the license to operate our business would be taken away from us.

Q. What license do you refer to?

A. Wholesaler's license.

Q. Who issues those licenses? A. The OPA.

Q. What are the requirements for those licenses?

A. There is a hotel supplier's license, wholesaler's license and there is a

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jobber's license. I think there are the three and each has their individual requirements as to mark-up in price and to whom you can sell. We knew that if it became known to OPA that we sold above the specified ceiling prices our licenses would be taken away.

Q. Who actually collected the excess charges on meat sales by your company during the years 1942 to 1944, inclusive? A. Bill always did.

Q. Did you also sometimes collect some of these excess charges?

A. The only times I would—not being in the office—would be just when I was around there and Bill would be in a conference and he would say, "Collect this amount," and I would and then I would always hand it to Bill. My answer refers to the period subsequent to November 16, 1942.

Q. Who set or determined the amount of overcharges to be collected in your business?

A. Well, as far as I know, there was never a set amount. Bill never let us know one day to the next—some he charged and some he didn't—one day he would have a figure and the next day a different one and some of the customers he would charge one price one time and another price at another time—it was just a matter of supply and demand.

Q. How much were the overcharges in cents per pound—do you know?

A. There was never a set figure—I could never tell you. We favored some of our customers—we were figuring on our postwar business.

(Government's Exhibit No. 52)

Q. Where were these cash funds usually kept after their collection and prior to the time distribution of such funds was made during those years?

A. Like I say, Bill always had them. I don't know where he kept them and I still don't know. I mentioned this—Fred and I both trusted Bill implicitly. I worked with Bill for quite some time in another business. We needed \$100.00 or something at one time and Bill told me where the money was—explained to me, and I went to his house to get it and I couldn't find it—I hunted and hunted. After he told me where it was, I spent at least thirty or forty minutes trying to find it and I couldn't. We never had a complete distribution of this fund represented by excess charges, but occasionally small sums were withdrawn from the fund on each of our requests. As far as I know the bulk of the funds was retained by Bill with the intention of paying the income tax when the occasion to declare our income tax arose. When the amended returns were filed about July 2, 1945, about \$76,000.00 was paid and none of this amount came directly from my or Fred's pockets, but it was all the amount of cash Bill had on hand.

Q. Where did Bill say the money was?

A. In one of his drawers.

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Q. You say then that the \$76,000.00 which was paid on the amended returns for the partnership and the individual returns of the partners came from the fund which had been kept intact, or partially so, by Bill Shubin and which he had built up from these excess charges, which were not recorded in your books? A. Yes.

(Government's Exhibit No. 52)

Q. When you filed your individual income tax returns for the years 1942, 1943, and 1944, you realized, didn't you, that all of your income was not reported in those returns?

A. All of it—no. I told Mr. Brady I definitely thought all of the income was declared in 1942, and I didn't know the tax was figured from January to January—I thought it was from March to March. I had never figured my income tax myself, and I thought also that when Bill had made these fictitious bills he had declared the money he had up to that time.

Q. Now, as to your individual income tax return for 1943, which was filed about March 1944, did you know at the time you filed that return that a part of the excess charges, or a part of your net income, represented by the overcharges, was omitted in that return?

A. Yes.

Q. Is your answer the same then as to your individual income tax return for the year 1944—did you know that some of your net income was omitted in your original return for 1944? A. Yes.

Q. Please state why you didn't include all of your income that you were conscious of having received at the times you filed your individual income tax returns for the calendar years 1943 and 1944?

A. As I stated before, I actually thought the OPA had access to the income tax returns and if they did so find any excess amounts, it was certain we would lose our operating wholesaler's license and be put out of business. At the time my original returns for 1943 and 1944 were

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prepared and filed by me, I knew that the net income thereon reported was understated, but I did not know by how much.

Q. What were your functions in the business—what were your duties?

A. Well, I was an over-all supervisor of all the production. I had complete charge of everything that came into the place and went out. I allocated the merchandise to the customers we figured in our postwar business. As I said before, I was interested in giving them a little better break, and I helped cut hogs when there was a man short—helped break beef when there was a man short there. I did part of every job that we have in our place, outside of the office. I had nothing at all to do with the prices that the merchandise was sold for.

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Q. Mr. Kissel, do you know whether your firm found it necessary to pay overcharges to the Southern California Meat Supply Company No. 2 in connection with its slaughtering for your company?

A. As far as I know, we never paid any overcharges to anyone. Bill always said he would rather go out of business than pay anyone overcharges. I had no connection with the direct purchase of merchandise, although I told Fred and Bill what I would need or what I would be short of. We always bought carcass hogs and beef, carcass lambs and veal. There was never any live stock that was purchased by us and killed as far as I know.

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(Mr. Phoebus questioning)

Q. This meat market operation that you had—when you reported your income from it, you inflated the income a great deal. When did that market operation stop?

A. I think it was in 1943 that we had the market.

Q. Was it in the spring of the year or the fall of the year?

A. It has been so long ago, I don't remember. All I did was just help the fellows out when I had spare time.

Q. When were the profits, including the inflated part of the profits, entered on the books?

A. That I don't know. The only thing I do know is that when Bill made the income tax return, he told me he was able to throw in a certain amount of money in addition to the profits of the market.

Q. That was the first time you discussed this device of increasing your income by inflating the profits of the market?

A. No, we had always discussed it. I know there were fictitious bills made.

Q. At the time this matter was mentioned in connection with the income tax return, was that the first time you remember it having been mentioned?

A. No.

Q. It was mentioned on a prior occasion.

A. Yes.

Q. In what connection?

A. As to the amount to turn in that wouldn't seem a ridiculous figure to OPA in running our market.

Q. Was there any necessity of bringing capital into the business during the year 1943?

A. Not that I know of.

(Government's Exhibit No. 52)

Q. That wasn't one of the motives then for increasing the profits from the

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market?

A. Our definite motive was to be able to declare it for income tax.

Q. I didn't ask that question. Was one of the motives to bring capital into the business for use?

A. The only reason I did know for putting it into our business was to declare it as income tax—I had no other knowledge.

Q. When did your firm commence to bone meat for the Government on a big scale?

A. We started to bone the latter part of last year.

Q. Late in 1944? A. Yes.

Q. Prior to that your boning operation was limited in comparison to your subsequent boning operations?

A. Yes.

Q. Then, as far as the packers were concerned, you had practically no advantage in your dealings with them because of the fact that you had boning facilities that were not otherwise available to them?

A. That's right. We had little advantage.

Q. You testified that you paid no overcharges for meat. In view of the fact that meat was difficult to obtain, how do you explain the fact that you were to get this economic advantage?

A. We had been in business prior to the war and we operated a legitimate business and it was a good business. We were in the same position as some of our "pet" accounts were—we expected a postwar business and I think that's the way the packers felt about it.

(Government's Exhibit No. 52)

Q. You think everyone on Vernon Avenue paid ceiling prices for his meat? A. So far as I know, yes.

Q. Though you received over the ceiling price when you sold meat, you testified Bill said he would go out of business if he had to pay overcharges. Do you think that's fair?

A. Well, in the meat business you have, while I don't want to bring out the names, customers that buy from you only when it necessitates buying and they can't buy any place else, and they were the ones that were paying. Our regular accounts we never charged, overcharged.

Q. You know Hyman Stillman and Lou Segal of the Southern California Meat Supply Company?

A. Yes.

Q. About December 27, 1944, Vernon Hotel & Restaurant Supply Company wrote a check for approximately \$22,000.00 to Southern California Meat Supply Com-

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pany No. 2. What was that for?

A. I never knew there was a check written for that amount.

Q. Did you receive in the cooler at about that time a large amount of meat from any source?

A. I know we received a lot of meat from them. We were boning for them and they allowed us a certain percentage for our civilian sales.

Q. Was this an old-line company that had been established in business for a long time?

A. I couldn't tell you.

Q. You don't know when Hyman Stillman came on the street? A. No.

(Government's Exhibit No. 52)

Q. Can you tell us of any business enterprise that you or your partners had outside of Vernon Hotel & Restaurant Supply Company?

A. None that I know of, except the apartment house. That's the only one I know of.

Q. And the California Meat Company—Mr. Woodward—was that considered a partnership venture?

A. I couldn't tell you. I don't know how that was worked—to this day, I don't know.

Q. You knew that a member of the firm, at least, had some interest in the California Meat Company?

A. Yes.

Q. But whether part of those funds were yours, or part of the other partners, or all belonged to Bill Shubin, you don't know? A. No.

Q. Do you know whether Bill loaned money to the California Meat Company? A. No, I don't know.

Q. Did I understand you to say, in connection with Bill Shubin and your confidence in him, that you were associated with him in another business? A. Yes.

Q. What business? A. Kermin Food Products.

Q. When was that?

A. That was prior to the time I worked for Dr. Pepper. I worked for Dr. Pepper for two years—it was around 1937 or 1938.

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Q. When did you leave school?

A. I graduated in January 1936.

(Mr. Bircher questioning)

Q. What prompted your company to file amended income tax returns for the years 1942 through 1944, which were filed on or about July 2, 1945?

(Government's Exhibit No. 52)

A. Well, it had always been a discussion with us as to how we could enter our money out in the open and file our income tax and not worry about it. Bill came to Fred and me and said that a friend had told him that he knew of a way we could declare our money and he was very much in favor of it and he would go right ahead and proceed with it, and we were in great favor of it, so Bill went ahead with it. The man's name was Henry Grossman.

Q. When did Bill come and make this proposal to you first?

A. It must have been four months ago—three or four months ago. I think it was about that time. I know we had spent quite some time with Mr. Rausch. I think he spent two months with us as to the amount of money we had actually used and had on hand.

Q. At the time Mr. Shubin proposed to you that you and your company should file amended returns, which was sometime in April 1945, did you know prior to that time that the Internal Revenue Department had started an investigation of your income tax liability or of the income tax liabilities of other tenants in your building?

A. No, definitely not. The only time I knew was when he (indicating Mr. Phoebus) walked into the office with another young fellow and explained that to us. That was the first time I knew.

Q. When was that, with reference to the time Wm. Shubin proposed to you that these amended returns should be filed?

A. It was just the day after our checks had been made for our income tax and we told Mr. Phoebus at the time

(Government's Exhibit No. 52)

he visited us in our office that our checks had just been made out the day previous and were in the mail.

Q. Mr. Kissel, did you ever see a little loose-leaf book or a bound note book wherein Mr. Shubin recorded the overcharges?

A. No, I don't think he ever kept any record book. I know that when we asked to know just about how we stood, he would have to go home and count the money. Sometimes we wouldn't know for three or four months how we stood—we just wouldn't bother about asking.

Q. During all this period from November 1942 until the end of December 1944, did you keep fairly current with the knowledge of how much your equity was in the fund that Bill Shubin kept at home?

A. Oh, well, there would be times when he would enter it in the business in the nature of fictitious bills that we wouldn't know anything about. Maybe

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at the end of the month he would say he entered so much into the business by means of these fictitious bills.

Q. Did you and your partners have a mutual agreement that you each owned one-third of the funds represented by this cash fund which Bill Shubin kept at home?

A. Yes, a mutual agreement.

Q. That was your understanding that you each owned a one-third interest?

A. Yes.

Q. Did you ask Bill from time to time how much the total of the fund was?

(Government's Exhibit No. 52)

A. Yes, that is, not the fund but the total value of the business—everything we had.

Q. But you stated that occasionally you asked how much was represented by this cash fund which he kept at home and he would have to go home and count it.

A. No, how we stood in the total of our business. I was never interested in the money he had at home except in the relationship it had to the total value we had in our business.

Q. Mr. Kissel, did you have any discussion, or do you know of any discussion, had by your partners, with any attorneys relative to some method by which you could report in your income tax returns these black market profits?

A. I didn't have any discussion with any attorneys but I know my partners had discussions with our attorneys, Vincent Sinatra and Mr. Del Valle, of Arnerich, Del Valle & Sinatra, regarding declaring the money through gambling, that is, cards, poker playing or horses, and Bill said the attorneys thought it was a very poor idea to declare it that way. I have known of these discussions, through what my partners have told me, for at least two years.

Q. Then it is your statement that Bill Shubin related to you that he had discussed this matter with your company's attorneys, as to whether or not some of these black market profits could be reported in your individual income tax returns under the guise of gambling profits, and Mr.

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Shubin reported to you that the attorneys advised him that that would not be proper; is that correct?

A. That's correct.

Q. Mr. Kissel, you are married? A. Yes.

Q. Please state the date. A. June 18, 1938.

Q. Do you have any dependents?

A. Two children—boy and a girl.

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Q. Mr. Kissel, you state that you were quite concerned over this question, or at least you discussed with your partners this question, of whether or not you should report your black market profits, since you were afraid the OPA officials might learn of it. Did you also discuss that matter with your wife during those years?

A. No, I never discuss any business with my wife.

Q. Did your wife know at any time that you, or your firm, was charging prices and making collections in excess of OPA ceiling prices for meat sold? A. No.

Q. At the time your individual income tax returns were filed for the years 1942, 1943 and 1944, did you advise your wife that all of your profits were not reported in those returns?

A. No, she didn't know anything about it.

Q. At the time you filed your original individual income tax returns for the years 1943 and 1944, why did you not have your wife sign the returns, or why didn't you have her file separate returns?

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A. They would just hand me the income tax returns and I would just sign the things and that was all there was to it and I thought it was properly taken care of.

Q. Have all of your statements and your answers this morning been given voluntarily by you, Mr. Kissel?

A. Yes.

Q. Have your statements and answers been given truthfully and to the best of your knowledge and belief?

A. Yes.

I have carefully read the foregoing transcript of my testimony, pages 1 to 12, and state that it is a true and correct transcript and that the answers to the questions propounded therein were given freely and voluntarily on my part.

Jack L. Kissel

Subscribed and Sworn to before me this 13 day of August, 1945.

Samuel J. Phoebus

Special Agent Bureau of Internal Revenue

J.L.K.

Case No. 18367 Cr. U. S. vs. Shubin. Gov. Exhibit. Date 6/19/46. No. 52 Identification. Clerk, U. S. District Court, Sou. Dist. of Calif. Cross, Deputy Clerk.

[Endorsed]: No. 11382. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 19, 1946. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * *

Los Angeles, California, Friday, June 21, 1946, 2:00 o'clock.

The Court: Stipulate that the jury is present, gentlemen?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Stipulate that the defendants are present?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Members of the jury, it becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty, as jurors, to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider the evidence for that purpose.

In this indictment upon the arraignment in this court the defendants entered a plea of not guilty which puts in issue every material allegation of the indictment which I am about to read to you.

"In the District Court of the United States, in and for the Southern District of California, Central Division. In the District Court of the Southern District of California, ss:

"The Grand Jurors of the United States of America, being duly impaneled, sworn and charged in the District

Court for the Southern District of California, Central Division, in the [2] September 1945 Term of said Court, having begun but not finished during the said September Term of Court, among other things, the matter of the investigations charged in this indictment, and having continued to sit by the order of this Court in and for the said District during the February 1946 Term to complete inquiries begun but not finished at the original term, and inquiring for that District, upon their oaths find and present as follows:

COUNT 1

"1. That William Shubin, Frederick Alexander Shubin, and Jack L. Kissel, whose names are to the Grand Jurors otherwise unknown, who are hereby indicted, and are hereinafter called the defendants, at all times material herein engaged in the sale of meat as wholesaler and/or hotel supply house of meat, under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239, under the firm name and style of Vernon Hotel and Restaurant Supply Company.

"2. That the said defendants, since on or about November 1, 1942, and continuously thereafter to and including the finding and presenting of this indictment, in the County of Los Angeles, State of California, and within the Division and District aforesaid and in other places to the Grand Jurors unknown, did feloniously and unlawfully conspire, combine and confederate together, and with divers other persons whose [3] names are to the Grand Jurors unknown, to commit offenses against the United States of America, to wit:

"a. That the said defendants would refuse and cause others to refuse to sell meat to any prospective purchaser

unless the price paid therefor was in excess of the maximum prices permitted under the Emergency Price Control Act of 1942, and of the Maximum Price Regulations Nos. 148, 169 and 239 thereunder;

“b. That the said defendants would sell and cause others to sell meat at prices in excess of the maximum prices permitted under the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“c. That the said defendants would make and cause others to make false, fictitious and fraudulent entries upon the records kept by and for the said defendants in the conduct of their aforesaid business, in connection with the purchases and sales of meats, in violation of the aforesaid Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“d. That the said defendants would make and cause others to make fictitious payments, loans, transfers, collections and receipts of money to and from other persons and firms for the purpose of concealing, and would otherwise conceal, the aforesaid illegal charges, false, fictitious and fraudulent entries and receipts of money for meat in excess of the [4] maximum prices permitted under the aforesaid Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“e. That the said defendants would issue and would cause others to issue various checks, notes and other evidences of payments, loans, collections, transfers and receipts which did not in truth and in fact represent the true and actual transactions between the parties, but which were fictitious and fraudulently made, received, transferred and entered on the books and records of the afore-

said defendants for the purpose of concealing their other aforementioned illegal activities in violation of the Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 169 and 239;

“f. That the said defendants would cause and would persuade others to cause divers persons to make false, untrue and fraudulent entries upon the records of the said divers persons for the purpose of concealing the aforesaid illegal activities of the said defendants;

“g. That the said defendants would engage and would cause others to engage in various similar and dissimilar schemes, tricks, falsifications and methods of their aforesaid illegal activities as might occur to them and others from time to time, in order to commit and to conceal the commission of violations of the aforesaid Emergency Price Control Act of 1942 and the Maximum Price Regulations Nos. 148, [5] 169 and 239;

“h. That each of the said defendants would share equally with the other defendants in all gains and profits flowing and accruing from any and all of the above-described illegal activities.

“3 That in furtherance of, and to effect the purposes and objects of said conspiracy, the said defendants, at the times and places hereinafter set forth, within the jurisdiction of this Court, committed the following overt acts:

“a. On or about November 16, 1942, the defendants entered into a partnership agreement.

“b. On or about December 31, 1943, the defendants made or caused to be made an entry on the general ledger of the Vernon Hotel and Restaurant Supply Company, account 301, showing total sales of meat by them during 1943 of \$747,394.28.

“c. On or about March 31, 1943, the defendants made or caused to be made an entry in the general ledger of the Vernon Hotel and Restaurant Supply Company, account 264, of the receipt in that account of \$25,273.50;

“d. On or about June 30, 1943, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$2,860.55.

“e. On or about October 31, 1943, the defendants made or caused to be made an entry upon the records of the Vernon [6] Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$15,477.79.

“f. On or about November 30, 1943, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$11,713.30.

“g. On or about April 30, 1944, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$17,999.56.

“h. On or about August 31, 1944, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$19,490.27.

“i. On or about February 24, 1945, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$57,943.80.

“j. On or about April 28, 1945, the defendants made or caused to be made an entry upon the records of the Vernon Hotel and Restaurant Supply Company, account 104, showing accounts receivable in the sum of \$103,030.75.

“k. On or about April 17, 1945, the defendants issued check No. 6962 of the Vernon Hotel and Restaurant Supply Co., payable to Wm. A. Shubin; [7]

“l. On or about July 25, 1945, the defendants issued check No. 72898 of the Vernon Hotel & Restaurant Supply Co., payable to William Shedd;

“m. On or about August 17, 1945, the defendants issued check No. 7382 of the Vernon Hotel & Restaurant Supply Co., payable to Sidney Blau;

“n. On or about August 21, 1945, the defendants issued check No. 7396 of the Vernon Hotel & Restaurant Supply Co., payable to the A. M. Provision Co.;

“o. On or about September 27, 1945, the defendants issued check No. 7540 of the Vernon Hotel & Restaurant Supply Co., payable to Rudolph Hauswald;

“p. On or about August 27, 1945, the defendants issued check No. 7535 of the Vernon Hotel & Restaurant Supply Co., payable to J. Joe Vega;

“q. On or about the 19th day of July 1944 the defendants issued or caused to be issued Invoice No. 41736 of the Vernon Hotel & Restaurant Supply Co.;

“r. On or about October 31, 1944, the defendants issued or caused to be issued Invoice No. 44235 of the Vernon Hotel & Restaurant Supply Co.;

“s. On or about December 4, 1944, the defendants issued or caused to be issued Invoice No. 45128 of the Vernon Hotel & Restaurant Supply Co.;

“t. On or about August 10, 1945, the defendants issued [8] or caused to be issued Invoice No. 5252 of the Vernon Hotel & Restaurant Supply Co.;

“u. On or about September 6, 1945, the defendants issued or caused to be issued Invoice No. 13013 of the Vernon Hotel & Restaurant Supply Co.;

“v. On or about December 12, 1945, the defendants issued or caused to be issued Invoice No. 16645 of the Vernon Hotel & Restaurant Supply Co.;

contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.”

I will read the language in Count 2 rather carefully because counsel for the government and the defendant have agreed that it will not be necessary to read the language in the various counts but to state the substance of them:

“And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 4th day of January 1944 in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Emil [9] Dvorak certain meat items, to wit: pork loins, short cuts (‘S/C’); pork shoulders, New York (‘NY’), as shown on Invoice No. 39251 of the Vernon Hotel & Restaurant Supply Company, for a price per pound which was, as the said

defendants then and there well knew, in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of 1942 and Maximum Price Regulation No. 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act, which maximum price per pound under the aforesaid Act and regulations then was: for pork loins, short cuts, 26 cents a pound; for pork shoulders, New York, 25 cents a pound; contrary to the form of the state in such case made and provided and against the peace and dignity of the United States of America.”

Count 3 contains the same general language except that it alleges that on the 21st day of January 1944 the defendants unlawfully sold to Emil Dvorak Grade A veal as shown on Invoice No. 39609 in violation of Maximum Price Regulation No. 169, and that the price for that veal as alleged in the indictment was 23 cents a pound. That is Count 3.

Count 4 is again in the same language but it alleges a sale on the 19th day of July 1944 by the defendants named alleging that they unlawfully sold to Emil Dvorak pork shoulders, New York; pork loins, *shot* curts (“S/C”), as shown on Invoice No. 41736, alleging that it was sold above the maxi- [10] mum price regulation No. 148 and that the maximum price regulation for pork shoulders, New York, was 26-1/4 cents a pound; for pork loins, short cuts, 27-1/2 cents a pound.

Count 5 again has the same language except the date. It alleges that on or about the 4th day of August 1944 the defendants unlawfully sold to Emil Dvorak pork loins, short cuts (“S/C”); pork shoulders, New York (“NY”); pork legs, Invoice No. 42076, in violation of Maximum

Price Regulation No. 148. It alleges that for pork loins, short cuts, 27-1/2 cents a pound; for pork shoulders, New York, 26-1/2 cents a pound; for pork legs, 27-1/2 cents a pound.

Count 6 is in the same language, that the defendants on the 21st day of September 1945 unlawfully sold to Emil Dvorak pork loins, short cuts ("S/C"); pork shoulders, New York ("NY"), as shown by Invoice No. 13563. The indictment alleges that this was sold above the maximum price regulation No. 148, that the maximum price for pork loins, short cuts, was 26-3/4 cents a pound; for pork shoulders, New York, was 25-3/4 cents a pound.

Count 7 charges that on the 12th day of December 1945 the same defendants unlawfully sold to Emil Dvorak pork loins, short cut ("S/C"); pork shoulders, New York ("NY"); bacon; hams, as shown on Invoice No. 16645. The indictment alleges that these were sold in violation of the maximum price regulation No. 148, and the maximum price per pound for pork loins, [11] short cut, was 27 cents a pound; for pork shoulders, New York, 26 cents a pound; for bacon 27 cents a pound; for hams 34-1/4 cents a pound.

Count 8 charges that on or about the 25th day of October 1944 the defendants sold to Emil Dvorak unlawfully Grade A veal as shown on Invoice No. 44072 in violation of maximum price regulation No. 169 which fixed the maximum price for Grade A veal at 22-3/4 cents a pound.

Count 9 charges that on or about the 17th day of September 1945 the defendants unlawfully sold to Emil Dvorak pork loins, short cuts; pork shoulders, New York ("NY") as shown by Invoice No. 13357. The indict-

ment alleges that this was a violation of maximum price regulation No. 148 which fixed the price for pork loins, short cuts, at 26-3/4 cents a pound; for pork shoulders, New York, 25-3/4 cents a pound.

Count 10 alleges that on or about the 16th day of February 1945, the same defendants unlawfully sold to Austin T. Snider Grade C beef as shown by Invoice No. 47443. The indictment alleges that this was in violation of maximum price regulation No. 169 which fixed the price for Grade C beef at 18-1/4 cents a pound.

Count 11 alleges that on the 20th day of March 1945 the defendants unlawfully sold to George F. Veuhoff's Market Grade B veal as shown by Invoice No. 48245 in violation of [12] maximum price regulation No. 169 which fixes the maximum price of Grade B veal at 21 cents a pound.

Count 12 has been withdrawn.

Count 13 has been withdrawn.

Count 14 has been withdrawn.

Count 15 has been withdrawn.

Count 16 alleges that on or about the 22nd day of October 1945 the defendants wilfully and unlawfully made or caused to be made an entry false in a material respect. I will read Count 16 in full because it deals with another situation:

“And the Grand Jurors aforesaid, upon their oaths aforesaid, do further charge and present:

That on or about the 22nd day of October 1945, in the City of Los Angeles, County of Los Angeles, State of California, in the district and division aforesaid, and within the jurisdiction of this Court, the said defendants

William Shubin, Frederick Alexander Shubin and Jack L. Kissel, doing business as aforesaid under the firm name and style of Vernon Hotel & Restaurant Supply Company, did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice 14649 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total price of \$247.26 and the said entry was false at the time of making of said record, all of which facts were then and there well known to said defendants at the time of said entry, and said record was [13] a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulation 148 thereunder, which had been duly promulgated pursuant to the provisions of said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Count 17 I will just state the substance of it because I have read Count 16 in full. It charges that on or about the 8th day of May 1945 the defendants wilfully and unlawfully made or caused to be made an entry false in a material respect on Invoice No. 3729 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$89.10. The indictment alleges that this was in violation of maximum price regulation No. 148.

Count 18 charges that on or about the 20th day of April 1945 the defendants did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice No. 3327 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$169.35. This alleges also that this

was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and maximum price regulation No. 148.

Count 19 has been withdrawn.

Count 20 charges that on or about the 15th day of November 1945 the defendants did wilfully and unlawfully [14] make or cause to be made an entry false in a material respect upon Invoice No. 15584 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$319.89. The indictment alleges that this was in violation of the Emergency Price Control Act of 1942 and maximum price regulations 148, 169 and 239.

Count 21 charges that on or about the 2th day of December 1944 that the defendants wilfully and unlawfully did make or cause to be made an entry false in a material respect on Invoice No. 45741 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$184.95. The indictment alleges that this was in violation of the Emergency Price Control Act of 1942 and maximum price regulation No. 148.

Count 22 charges that on or about the 7th day of June 1945 the defendants did wilfully and unlawfully make or cause to be made an entry false in a material respect upon Invoice No. 4437 of the aforesaid Vernon Hotel and Restaurant Supply Company, showing a total sum charged of \$453.17. The indictment alleges that this was a document required to be kept under the Emergency Price Control Act of 1942 and maximum price regulations 148, 169 and 239.

Count 23 charges that on or about the 29th day of November 1944 the defendants wilfully and unlawfully

did offer, solicit and attempt and agree to sell and did sell to [15] Austin T. Snider certain meat items, to wit, pork bellies, hogs, back fat, as shown on Invoice No. 44976, in violation of maximum price regulation No. 148; that the price for pork bellies was 21-3/4 cents a pound; hogs, 21-1/2 cents a pound; back fat, 13 cents a pound.

Count 24 alleges that on or about December 7, 1944, the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to wit, packer hogs, as shown on Invoice No. 45217 in violation of maximum price regulation No. 148, which regulation provided for the price of packer hogs at 21-1/2 cents a pound.

Count 25 alleges that on or about the 26 day of February 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to Austin T. Snider certain meat items, to wit, packer hogs, as shown on Invoice No. 47682 in violation and in excess of the maximum price as fixed by maximum price regulation No. 148 at 21-1/2 cents a pound.

Count 26 has been withdrawn.

Count 27 has been withdrawn.

Count 28 has been withdrawn.

Count 29 has been withdrawn.

Count 30 charges that on or about the 14th day of February 1945 the defendants wilfully and unlawfully did offer, [16] solicit, attempt and agree to sell and did sell to George's Market (George A. Veuhoff) certain meat items, to wit, Grade C. beef as shown on Invoice No. 47374 above the maximum price regulation No. 169 which fixes the price for Grade C beef at 18-1/4 cents a pound.

Count 31 charges that on or about the 13th day of February 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit, Grade CC beef, Grade C beef, as shown on Invoice No. 47348 in violation of maximum price regulation No. 169, which fixes the maximum price for Grade CC beef at 15-1/2 cents a pound and for Grade C beef 18-1/4 cents a pound.

Count 32 charges that on or about the 26th day of January 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit, hams, bacon, as shown on Invoice No. 46740 for a price per pound in excess of the maximum price regulation No. 148, which fixes the maximum price for hams at 34 cents a pound and for bacon at 27 cents a pound.

Count 33 charges that on or about the 5th day of February 1945 the defendants wilfully and unlawfully did offer, solicit, attempt and agree to sell and did sell to George's Market (George F. Veuhoff) certain meat items, to wit, hams, as shown [17] on Invoice No. 47034 in excess of the maximum for said items as fixed by maximum price regulation No. 148. The maximum price per pound under the regulation for hams was 34 cents a pound.

Count 34 has been withdrawn.

Count 35 has been withdrawn.

Count 36 has been withdrawn.

Count 37 has been withdrawn.

Count 38 has been withdrawn.

Count 39 has been withdrawn.

Count 40 has been withdrawn.

Have I omitted to state any count that was not withdrawn?

Mr. McLaughlin: No, your Honor.

Mr. Strong: No, your Honor.

The Court: Now, that is the indictment and, as I have already stated, to that indictment each of the defendants has pleaded not guilty which puts the government upon its proof to establish the material allegations of the indictment beyond a reasonable doubt.

By the finding of an indictment or filing an information no presumption whatsoever arises to indicate that a defendant is guilty, or that he has had any connection with, or responsibility for, the act charged against him. A defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the government [18] shows him to be guilty beyond a reasonable doubt. The burden is not upon a defendant to establish his innocence and this rule applies to every material element of the offense charged. Mere suspicion or mere probability will not authorize a conviction.

You are instructed that the law does not require any defendant to prove his innocence, which in many cases might be impossible, but, on the contrary, the law requires the government to establish any such guilt by legal evidence and beyond a reasonable doubt. The presumption of innocence goes with the defendant throughout the whole trial, and such presumption outweighs and overbalances all suspicions and suppositions, and can only be destroyed by proof of guilt beyond a reasonable doubt.

You are instructed that the presumption of innocence with which the defendant is at all times clothed is not a mere form to be disregarded by you at pleasure, but that it is an essential, substantial part of the law and binding on you in this case, and it is your duty in this case to give the defendant the full benefit of this presumption, and to acquit these defendants, and each of them, unless the evidence, in the case convinces you of their guilt as charged beyond all reasonable doubt.

If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence, [19] you should do so, and in that case find the defendant not guilty. You cannot find the defendant guilty unless from all the evidence you believe him guilty beyond a reasonable doubt.

A reasonable doubt is a doubt based on reason and which is reasonable in view of all the evidence, and if, after an impartial comparison and consideration of all the evidence or from a want of sufficient evidence on behalf of the government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if, after such impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt.

By such reasonable doubt, you are not to understand that all doubt is to be excluded; it is impossible in the determination of these questions to be absolutely certain. You are required to decide the question submitted to you

upon the strong probabilities of the case and, to justify a conviction, the probabilities must be so strong as not to exclude all doubt or possibility of error, such as to exclude reasonable doubt.

When weighing all the evidence, you have an abiding conviction and belief that the defendant is guilty, it is [20] your duty to convict, and no sympathy justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of evidence or facts.

Reasonable doubt is not any mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

The law under which Count 1 of the indictment in this case is drawn provides that if two or more persons conspire to commit any offense against the United States, and one or more of them does any act to effect the object of the conspiracy, each of the parties to such conspiracy is guilty. In determining whether the defendants conspired to commit any offense as charged in Count 1, you cannot find that such conspiracy existed by reason of statements of the defendants alone. There must be other evidence showing that they had so conspired.

In order to warrant you in finding a verdict of guilty against the defendants, or any of them, it is necessary that you be satisfied beyond a reasonable doubt that a conspiracy as charged in Count 1 of the indictment was entered into be- [21] tween two or more of the defend-

ants to violate the law of the United States in the manner described in the indictment. It is necessary further, that in addition to the showing of the unlawful conspiracy or agreement, the government prove to your satisfaction, beyond a reasonable doubt, that one or more of the overt acts described in the indictment was done by one or more of the defendants or at their direction or with their aid.

To constitute a conspiracy it is not necessary that two or more persons should meet together and enter into an express or formal agreement for the unlawful venture or scheme, or that they should directly, by words or in writing, state between themselves or otherwise what the unlawful plan or scheme is to be, or the details thereof, or the means by which the unlawful combination is to be made effective. It is sufficient if two or more persons, in any manner, or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common and unlawful design. In other words, when an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy. The success or failure of the conspiracy is immaterial, but before the defendants may be found guilty of the charge it must appear [22] beyond a reasonable doubt that a conspiracy was formed as alleged in the indictment, and that the defendants were active parties thereto.

Every essential fact necessary to constitute the conspiracy charged must be proved by sufficient evidence, including the necessary intent or motive, and the com-

mission of the overt act; and the evidence must sufficiently establish the existence of a confederation or agreement between two or more persons, and that at least two of the persons charged committed the offense. Proof of overt acts may or may not be sufficient to prove the existence of the conspiracy, but such acts may properly be considered with other evidence in determining the existence of the conspiracy. Not only must the conspiracy be established, but it is equally essential to show accused's connection therewith if a conviction is to be sustained, and it is necessary, as it is in criminal prosecutions generally, to establish the guilt of the accused beyond a reasonable doubt.

Under the charge made the conspiracy constitutes the offense and it must be made to appear from the evidence, beyond a reasonable doubt, before any defendant can be convicted, that such defendant was a party to the conspiracy and unlawful agreement charged, and that he continued to be such up to the time that overt acts were committed, if the evidence shows that there were any such. The mere fact that [23] either or any of the defendants named may have engaged in the performance of any of the acts charged in the indictment as overt acts, would not authorize a conviction by reason of that fact alone, but it is necessary to show that such defendant or defendants were parties to the conspiracy and unlawful agreement before their guilt of the offense charged is made out.

Each party must be actuated by an intent to promote the common design. If persons pursue by their acts the same unlawful object, one performing one act, and a second another act, all with a view to the attainment of

the object they are pursuing, the conclusion is warranted that they are engaged in a conspiracy to effect that object. Cooperation in some form must be shown. There must be intentional participation in the transaction with a view and purpose to further the common design. And if a person, understanding the unlawful character of a transaction, encourages, advises, or in any manner, with a purpose to forward the enterprise or scheme, assists in its prosecution, he becomes a conspirator. And so a new party, coming into a conspiracy after its inception, with knowledge of its purpose and object, and with intent to promote the same, becomes a party to all of the acts done before his introduction into the unlawful combination, as well as to the acts done afterwards. Joint assent and joint participation in the conspiracy may be found, like [24] any other fact, as an inference from facts proved.

Where the existence of a criminal conspiracy has been shown, every act or declaration of each member of such conspiracy, done or made thereafter pursuant to the concerted plan and in furtherance of the common object, is considered the act and declaration of all the conspirators and is evidence against each of them. On the other hand, after a conspiracy has come to an end, either by the accomplishment of the common design, or by the parties abandoning the same, evidence of acts or declarations thereafter made by any of the conspirators can be considered only as against the person doing such acts or making such statements. The declaration or act of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration.

It is not necessary that it be shown that any person concerned in the alleged conspiracy profited by the things which he did, but if any of the defendants, with knowledge that the law was designed to be violated in the particular manner charged in the indictment, aided in any way by affirmative action in the accomplishment of the unlawful act, they would be guilty.

The defendants are here prosecuted for alleged violations of the Emergency Price Control Act of 1942, in that they violated certain regulations issued pursuant to this Act. This [25] law was adopted by the Congress of the United States pursuant to authority given to the Congress of the United States by the Constitution. You are not concerned with the wisdom or unwisdom of this Act or the regulations involved. They are the law of the land and you must be governed by them in the determination of this case.

It is not an offense under the regulations or the law involved in this case to refuse to sell meat to a purchaser or prospective purchaser regardless of the reason for such refusal.

The regulations of the Office of Price Administration which were involved in this case require that the seller maintain an accurate record of each sale, transfer, delivery, purchase, receipt, acquisition, or other such transaction, showing:

(1) The date thereof.

(2) The names and addresses of the parties taking part in the transaction, such as the buyer and seller.

(3) The description, quantity and weight of all wholesale pork cuts sold, transferred, delivered, purchased, received or acquired, specifically showing:

(i) The descriptive name of the wholesale pork cut, including the grade of sliced bacon.

(ii) The weight range or ranges of dressed hogs and/or wholesale pork cuts as named and defined in this regulation. [26]

(iii) The number of pieces in each weight range of any items for which ranges are specified, except spare ribs and Boston butts.

(iv) The total weights of all items in each specified weight range.

(4) The price charged, received or paid therefor, and they do not require the maintenance of any other records, or documents.

The parties to this case have stipulated that the highest legal prices which could be charged for the meat items with which you are concerned in this case, are the prices stated on the various invoices which have been introduced in evidence in this case.

I now instruct you that under the Emergency Price Control Act of 1942 and the maximum price regulations Nos. 148, 169 and 239, the highest prices which could be charged for the various meat items involved in this case are those shown on the invoices which have been introduced in evidence.

The maximum legal prices relative to each count of the indictment are as follows:

Count 2 for pork loins, short cuts, 26 cents a pound; for pork shoulders, New York, 25 cents a pound;

Count 3 for Grade A veal, 23 cents a pound;

Count 4 for pork shoulders, New York, 26-1/4 cents a pound. For pork loins, short cuts, 27-1/2 cents a pounds [27]

Count 5 for pork loins, short cuts, 27-1/2 cents a pound; for pork shoulders, New York, 26-1/4 cents a pound; for pork legs, 27-1/2 cents a pound;

Count 6 for pork loins, short cuts, 26-3/4 cents a pound; for pork shoulders, New York, 25-3/4 cents a pound;

Count 7 for pork loins, short cut, 27 cents a pound; for pork shoulders, New York, 26 cents a pound; for bacon 27 cents a pound; for hams 34-1/4 cents a pound;

Count 8 for Grade A veal, 22-3/4 cents a pound;

Count 9 for pork loins, short cuts, 26-3/4 cents a pound; for pork shoulders, New York, 25-3/4 cents a pound;

Count 10 for Grade C beef, 18-1/4 cents a pound;

Count 11 for Grade B veal, 21 cents a pound;

Count 23 for pork bellies, 21-3/4 cents a pound; hogs 21-1/2 cents a pound; back fat, 13 cents a pound;

Count 24 for packer hogs, 21-1/2 cents a pound;

Count 25 for packer hogs, 21-1/2 cents a pound;

Count 26 for pork shoulders, New York, 26 cents a pound; pork loins, short cuts, 27 cents a pound; Grade A beef, 22 cents a pound; Grade A lamb, 25-3/4 cents a pound;

Count 27 for Grade A regular beef chucks, 21-1/4 cents a pound; Grade AA beef rounds, 24-3/4 cents a pound; Grade A beef, 22 cents a pound, and Grade AA beef, 23 cents a pound;

Count 28 for pork bellies, 21 cents a pound;

Count 29 for Grade C beef, 18-1/4 cents a pound; for Grade [28] B veal, 21 cents a pound;

Count 30 for Grade C beef, 18-1/4 cents a pound;

Count 31 for Grade CC beef, 15-1/2 cents a pound;
for Grade C beef, 18-1/4 cents a pound;

Count 32 for hams, 34 cents a pound; for bacon, 27 cents a pound;

Count 33 for hams, 34 cents a pound;

Count 34 for pork bellies, 21 cents a pound;

You need not be concerned with the fact that prices vary for the same item. That results from changes in the maximum price regulations.

During the course of this trial objections were made to the introduction of certain documents in evidence and to some of the questions asked the witnesses. In each instance I have ruled on the objection made, and I either admitted the evidence or excluded it. As the judge in this case, it is exclusively my duty and power to make such rulings. Both counsel for the parties and you, the jury, are bound by those rulings. In your deliberations you are not to reconsider or question my rulings. You must accept them, and must treat the evidence which I have admitted into the record as being properly before you in this case.

A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. [29]

A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

The Emergency Price Control Act of 1942, provides that any person who wilfully violates certain provisions of the Act shall be guilty of an offense.

Among the provisions of the Act to which this provision applies is the following:

“It shall be unlawful, regardless of any contract, agreement . . . or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, . . . or otherwise do or omit to do any act, in violation of any regulation or order . . . of any price schedule effective in accordance with the provisions of” this Act.

The prices which I have read to you as the highest lawful price in effect on certain days for the several meat items, to which I have referred, were fixed in accordance with the Emergency Price Control Act of 1942 from which I have just read and those prices, and each and every one of such prices was accordingly fixed by law.

Defendants are charged with having wilfully violated these regulations. The word “wilfully” as used in the Emergency Price Control Act of 1942 and in the indictment simply means an intentional, conscious doing of the act prohibited; [30] that is, intending the result which actually comes to pass, without ground for believing it is lawful, or conduct marked by careless disregard as to whether or not one has the right so to act. Or to express it another way, it means purposely or obstinately, and is designed to describe the attitude of a person, who, having a free will or choice, either intentionally disregards the law or is plainly indifferent to its requirements.

This is an offense requiring a specific intent, and such intent must be shown to exist beyond a reasonable doubt. The intent on the part of the defendant may be shown by his acts and declarations and by the circumstances surrounding his actions which, when taken together, must

prove beyond a reasonable doubt that the defendant had the specific intent to wilfully sell and deliver meat at a price or prices in excess of the lawful price or prices.

If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one or more of the persons named in the several counts of the indictment, and that he did in fact charge a price or prices for such meat in excess of the prices I have stated to you, and that he at such time or times intended to so sell such meat at higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent. [31]

The Emergency Price Control Act of 1942, as amended, makes it unlawful for any person to sell or deliver any commodity, or to do or omit to do any act in violation of any regulation or price schedule, or to offer, solicit, attempt or agree to do so.

Maximum Price Regulations Nos. 148, 169 and 239 are price regulations issued pursuant to the Emergency Price Control Act of 1942.

Maximum Price Regulation No. 148 deals with dressed hogs and wholesale pork cuts. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts. Maximum Price Regulation No. 239 deals with lamb and mutton carcasses and wholesale cuts.

Revised Maximum Price Regulation No. 169 in part provides:

“Section 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agree-

ment, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dress-
[32] ing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *

Section 1364.407 Records and reports. * * *

“(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and the weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor.”

* * *

“Section 1364.401 Prohibition against selling beef and veal carcasses and whole cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or

deliver any beef carcass or beef wholesale cut, and no person shall buy or receive [33] any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by Section 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *

There are in effect substantially similar provisions in Revised Maximum Price Regulations 148 as to pork, and 239 as to lamb, except that under Revised Maximum Price Regulation 148 there is no evasion provision such as I have read above, and the record keeping provision is in different terms. The substance of the regulation is that certain records must be kept including such as are involved in this case and that they must be truthful and cannot be wilfully made false.

There were originally 40 counts in this indictment. The government has elected, as it has a right to do, not to *ffer* any evidence in support of Counts 12, to 15, 19, 26, to 29, 34 to 40. These counts are no longer a part of this indictment and are not to be considered by you. Of the remaining 26 counts which are before you, Count 1 has been brought under Title 18, U. S. C. Sec. 88, commonly called the conspiracy statute. The remaining 24 counts have been brought under the Emergency Price Control Act of 1942, as amended, Title 50, U. S. C. App. Sec. 901 et seq. All those counts relate to the alleged illegal overceiling sales of meat and to false record invoice entries as to such sales. The counts charging [34] overceiling sales are 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 23, 24, 25, 30, 31, 32 and 33. The counts charging false entries are 16, 17, 18, 20, 21 and 22.

Concerning each of Counts 16, 17, 18, 20, 21 and 22 of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts, the defendants or any defendant sold the meat shown in each such count at a price per pound in excess of that shown on the invoice described in each such count and introduced in evidence in this case, and that the defendants or any defendant wilfully and deliberately, and not as a result of innocent mistake entered or caused to be entered upon said invoice a statement showing such sale, an entry that the sale had been made at a price per pound below that at which the sale was actually made, then you will find the defendant or defendants guilty as charged in that count of the indictment, regardless of what you may believe the correct ceiling price of such meat to have been at that time.

On the other hand, if you entertain a reasonable doubt as to whether any one or more of the elements I have just recited to you have been proved, you must give the defendant or defendants the benefit of that doubt and acquit him or them.

Counts 16, 17, 18, 20, 21 and 22 of the indictment allege an offense of making or keeping false invoices. Unless [35] you are satisfied beyond a reasonable doubt that each of such invoices was false in some respect, you must find for the defendants on each of those counts.

Concerning each of Counts 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 23, 24, 25, 30, 31, 32 and 33, of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts the defendants or any one of them did on that date sell the items alleged as to each such count in the indictment

and as a part of each such transaction did wilfully require of and receive from the purchaser the payment of any sum of money in excess of the maximum price per pound, then you will convict the defendant or defendants of the offense charged in that count. But if you have any reasonable doubt as to whether any one or more of the elements I have read to you have been proved, you will acquit the defendant or defendants as to that count.

Certain witnesses in this case have given testimony in effect that they have engaged in unlawful transactions with the defendants in that they paid to the defendants overceiling prices for the meat which these witnesses purchased from the defendants. Although they may not be accomplices in the technical sense that they claim to have committed the identical crime with which defendants are charged, I think it appropriate to instruct you that under their testimony they have [36] claimed an unlawful association with the subject matter of the case, that if you believe their testimony you will accept the proposition that they are themselves violators of the Emergency Price Control Act of 1942. You should subject the testimony of those witnesses to close scrutiny and it should be treated with caution. You must examine it with care to determine whether it is trustworthy. However, if such evidence does produce conviction in your minds so that you do believe it to be true you may rely upon it. The testimony of associates in crime is sufficient to support a conviction if believed, provided that it otherwise meets the requirements of these instructions.

Without it being restated or repeated, you are to understand that the requirement that a defendant's guilt be shown beyond a reasonable doubt is to be considered

in connection with and as accompanying all the instructions that are given to you.

You are the sole judges of the credibility and the weight which is to be given to the different witnesses who have testified upon this trial. In judging of the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be repelled by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence. [37]

In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable jurors. You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, his demeanor, his manner while on the stand, his intelligence, the relation which he bears to the parties to this action, the manner in which he might be affected by the verdict and the extent to which he is contradicted or corroborated by other evidence, if at all, and every matter that tends reasonably to shed light upon his credibility.

Testimony of any person participating in a crime, whether participating as a buyer or seller in a transaction forbidden by law, is not entitled to the full credit given to testimony of other witnesses, regardless of whether such accomplice has been called by the government or the defense.

Under the terms of the regulations, a buyer is prohibited from paying a price in excess of the ceiling price and a seller is prohibited from selling in excess of the

ceiling price, so if a buyer paid in excess of the ceiling price, he would be an accomplice.

Testimony of a witness as to what one of the defendants might have said is not admissible as against any other defend- [38] ant not present at the time that such statement was made unless you find from other evidence that a conspiracy exists.

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number or a presumption or other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

The testimony of one witness, entitled to full credit, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even if a number of witnesses have testified to the contrary, if, from the whole case, considering the credibility of the witnesses and after weighing the various factors of evidence, the jury should believe that there is a balance of probability pointing to the accuracy and honesty of the one witness.

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the

whole [39] testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favor his testimony in other particulars.

The defendant in a criminal action is not required to take the stand and testify. No presumption of guilt should be indulged in by you for the reason that the defendants have not testified. The government under our law must establish the guilt of each defendant beyond a reasonable doubt. The defendants are not required to establish their innocence.

It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict. You are not limited in your consideration of the evidence to the bald expressions of the witnesses. You are authorized to draw such inferences from the facts and circumstances which you find have been proved as seem justified in the light of your experience as reasonable men and women. Admissions of a defendant are to be received with caution.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect evidence is that [40] which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted the jury is bound to find according to the presumption.

An inference is a deduction which the reason of the jury draws from the facts proved. It must be founded on a fact or facts proved and be such a deduction from those facts "as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

The word "propensity" as used in this instruction means any "natural or habitual inclination or tendency."

The law in regard to circumstantial evidence is this: In order to justify a jury in finding a verdict of guilty based entirely on circumstantial evidence, the circumstances must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated on the evidence; or, stated in [41] another form, it is not sufficient that the circumstances proved coincide with, or account for, and therefore render probable, the hypothesis of guilt asserted by the prosecution, but they must exclude to a moral certainty and beyond a reasonable doubt, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty. In order to warrant a conviction of crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts necessary to the conclusion

must be consistent with each other and with the main facts sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the defendant (and no other person) committed the offense charged; and unless the evidence does so it will be your duty to acquit the defendant. So, ladies and gentlemen, you will observe that there is nothing very peculiar or hard to understand about this doctrine of circumstantial evidence. The jury, in the first place, must determine from the testimony of the witnesses what are the facts and circumstances in the case—the facts and circumstances which you believe have been established by the testimony; and then you simply apply your common sense and judgment to a consideration of what deductions or inferences or con- [42] clusions ought to be drawn from those facts. And if, on consideration of all the facts which you may believe to have been established by the evidence, you are satisfied in your own minds, beyond a reasonable doubt, that the defendant is guilty, then it is your duty to so declare; but, if you are not so satisfied, it will be your duty to render a verdict of not guilty.

You shall not consider as evidence any statement or argument of counsel made during the trial, unless such statement or argument was made as an admission or stipulation conceding the existence of a fact or facts, or you find justified by the evidence. You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you never had heard it. You are to decide this case solely upon the evidence that

has been admitted by the court, and the inferences that you may reasonable draw therefrom, and such presumptions as the law may deduce therefrom, as directed in my instructions, and in accordance with the law as I state it to you.

In judging of the evidence, you are to give it a reasonable and fair construction, and you are not authorized, because of any feeling or sympathy or other bias, to apply a strained construction, one that is unreasonable, in order to justify a certain verdict when, were it not for such feeling [43] or bias, you would reach a contrary conclusion. And, whenever, after a careful consideration of all of the evidence, your minds are in that state where a conclusion of innocence is indicated equally with a conclusion of guilt, or there is a reasonable doubt as to whether the evidence is so balanced, the conclusion of innocence must be adopted.

If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others.

There are two types of verdict. One is a verdict of guilty and the other is a verdict of not guilty. Whatever verdict you render must be unanimous. It is not necessary that you rendered the same verdict as to each defendant, nor is it necessary before returning a verdict as to a particular defendant or defendants that you shall have reached a unanimous verdict as to some other defendant. If you cannot agree with respect to any de-

fendant or the defendants, you should so advise the court after becoming satisfied that such an agreement is impossible among you.

There is nothing peculiarly different in the way a jury is to consider the proof in this criminal case from that by [44] which men give their attention to any question depending upon evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendant is entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the government is entitled to a verdict. In determining what your verdict shall be you are to consider only the evidence before you. To the jury exclusively belongs the duty of determining the facts. The law you must accept from the court as correctly declared in these instructions.

You are instructed that if I have done or said anything which has suggested to you that I am inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by any such suggestion. While the law permits the judge to express his opinion on the evidence, I have not expressed, nor intended to express, nor have I intimated nor intended to intimate, any opinion as to what witnesses are, or are not worthy of credence; what facts are, or are not, established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opin-

ion relating to any of these matters, [45]. I instruct you to disregard it.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against any party to the action. The attitude of jurors at the outset of their deliberations is a matter of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if and when shown that it is fallacious. Remember that you are not partisans or advocates in this matter, but are judges. The final test of the quality of your service will lie in the verdict which you return to this court room, not in the opinions any of you may hold as you retire. Have in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict in this case. To that end, the court would remind you that in your deliberations in the jury room there can be no triumph excepting the ascertainment and declaration of the truth. It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you I would say that you must decide the case for yourself but should [46] do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous.

However, you should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. Upon retiring to the jury room you will select one of your number to act as foreman who will preside over your deliberations and who will sign the verdict to which you agree. As soon as you shall have agreed upon a unanimous verdict, you shall have it signed and dated by your foreman, and then shall return with it to this room.

A form of verdict will be given to you. It reads:

“In the District Court of the United States, in and for the Southern District of California, Central Division.

“United States of America, plaintiff, vs. Jack L. Kissel, defendant.”

There is a blank line in front of each numbered count of the indictment and in that blank space you will write the words “Guilty” or “Not Guilty” as you shall find.

The second page reads:

“We the jury in the above-entitled case find the defendant [47] ant Frederick Alexander Shubin,” and then a blank line in front of each one of the counts in which you will write “Guilty” or “Not Guilty.”

The third page reads:

“We the jury in the above-entitled case find the defendant William A. Shubin charged as William Shubin,” and then a blank line in which you will write either “Guilty” or “Not Guilty.”

Any exceptions, gentlemen, to the instructions?

Mr. Neukom: None, your Honor.

The Court: The defendants?

Mr. McLaughlin: No exceptions.

The Court: Swear the bailiff.

(Thereupon, at 3:40 o'clock p. m., the jury retired to begin their deliberations, and returned to the court room with their verdict at 8:32 o'clock p. m., of the same evening.)

The Court: Stipulate that the jury is present?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Stipulate that the defendants are in the court room?

Mr. McLaughlin: So stipulated.

Mr. Neukom: So stipulated.

The Court: Ladies and gentlemen, have you arrived at [48] a verdict in this case?

The Foreman: We have, your Honor.

The Court: Hand it to the bailiff. The clerk will read the verdict.

The Clerk: "In the District Court of the United States, in and for the Southern District of California, Central Division.

"United States of America, plaintiff, vs. Jack L. Kissel, defendant; No. 18367 Criminal.

"We, the jury in the above entitled case, find the defendant Jack L. Kissel:

"Guilty as charged in the first count of the indictment;

"Guilty as charged in the second count of the indictment;

"Guilty as charged in the third count of the indictment;

"Guilty as charged in the fourth count of the indictment;

"Guilty as charged in the fifth count of the indictment;

"Guilty as charged in the sixth count of the indictment;

"Guilty as charged in the seventh count of the indictment;

"Guilty as charged in the eighth count of the indictment;

"Guilty as charged in the ninth count of the indictment;

"Guilty as charged in the tenth count of the indictment;

"Guilty as charged in the 11th count of the indictment;

"Guilty as charged in the 16th count of the indictment;

"Guilty as charged in the 17th count of the indictment;

"Guilty as charged in the eighteenth count of the indictment; [49]

"Guilty as charged in the 20th count of the indictment;

"Guilty as charged in the 21st count of the indictment;

"Guilty as charged in the 22nd count of the indictment;

"Guilty as charged in the 23rd count of the indictment;

"Guilty as charged in the 24th count of the indictment;

"Guilty as charged in the 25th count of the indictment;

"Guilty as charged in the 30th count of the indictment;

"Guilty as charged in the 31st count of the indictment;

"Guilty as charged in the 32nd count of the indictment;

"Guilty as charged in the 33rd count of the indictment.

"Dated: Los Angeles, California, June 21st, 1946.

"C. P. Conrad, Foreman of the Jury."

“In the District Court of the United States, in and for the Southern District of California, Central Division.

“United States of America, plaintiff, vs. Frederick Alexander Shubin, defendant; No. 18367 Criminal.

“We the jury in the above-entitled case find the defendant Frederick Alexander Shubin:

“Guilty as charged in the first count of the indictment;

“Not guilty as charged in the second count of the indictment;

“Not guilty as charged in the third count of the indictment;

“Not guilty as charged in the fourth count of the indictment; [50]

“Not guilty as charged in the fifth count of the indictment;

“Not guilty as charged in the sixth count of the indictment;

“Not guilty as charged in the seventh count of the indictment;

“Not guilty as charged in the eighth count of the indictment;

“Not guilty as charged in the ninth count of the indictment;

“Not guilty as charged in the tenth count of the indictment;

“Not guilty as charged in the 11th count of the indictment;

“Guilty as charged in the 16th count of the indictment;

“Guilty as charged in the 17th count of the indictment;

“Guilty as charged in the 18th count of the indictment;

“Guilty as charged in the 20th count of the indictment;

“Guilty as charged in the 21st count of the indictment;

“Guilty as charged in the 22nd count of the indictment;

“Not guilty as charged in the 23rd count of the indictment;

“Not guilty as charged in the 24th count of the indictment; [51]

“Not guilty as charged in the 25th count of the indictment;

“Not guilty as charged in the 30th count of the indictment;

“Not guilty as charged in the 31st count of the indictment;

“Not guilty as charged in the 32nd count of the indictment;

“Not guilty as charged in the 33rd count of the indictment;

“Dated: Los Angeles, California, June 21, 1946.

“C. P. Conrad, Foreman of the Jury.”

“In the District Court of the United States, in and for the Southern District of California, Central Division,

“United States of America, plaintiff, vs. William A. Shubin, charged as William Shubin, defendant; No. 18367 Criminal.

“We, the jury in the above-entitled case, find the defendant William A. Shubin, charged as William Shubin:

“Guilty as charged in the first count of the indictment;

“Guilty as charged in the second count of the indictment;

“Guilty as charged in the third count of the indictment;

"Guilty as charged in the fourth count of the indictment;

"Guilty as charged in the fifth count of the indictment;

"Guilty as charged in the sixth count of the indictment; [52]

"Guilty as charged in the 7th count of the indictment;

"Guilty as charged in the eighth count of the indictment;

"Guilty as charged in the ninth count of the indictment;

"Guilty as charged in the 10th count of the indictment;

"Guilty as charged in the 11th count of the indictment;

"Guilty as charged in the 16th count of the indictment;

"Guilty as charged in the 17th count of the indictment;

"Guilty as charged in the 18th count of the indictment;

"Guilty as charged in the 20th count of the indictment;

"Guilty as charged in the 21st count of the indictment;

"Guilty as charged in the 22nd count of the indictment;

"Guilty as charged in the 23rd count of the indictment;

"Guilty as charged in the 24th count of the indictment;

"Guilty as charged in the 25th count of the indictment;

"Guilty as charged in the 30th count of the indictment;

"Guilty as charged in the 31st count of the indictment;

"Guilty as charged in the 32nd count of the indictment;

"Guilty as charged in the 33rd count of the indictment.

"Dated: Los Angeles, California, June 21, 1946.

"C. P. Conrad, Foreman of the Jury."

So say you all, ladies and gentlemen?

The Jury: Yes.

The Court: Does either the government or the defendant wish the jury polled?

Mr. Neukom: No, your Honor. [53]

Mr. McLaughlin: No, your Honor.

The Court: Ladies and gentlemen of the jury, you will be excused from further service until notified by the clerk to report.

Thank you.

[Endorsed]: Filed Sep. 13, 1946. [54]

[Endorsed]: No. 11382. In the United States Circuit Court of Appeals for the Ninth Circuit. William Shubin, Frederick Alexander Shubin and Jack L. Kissel, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed September 19, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11382

WILLIAM SHUBIN, FREDERICK ALEXANDER
SHUBIN, and JACK L. KISSEL,

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY ON APPEAL

To Paul P. O'Brien, Clerk of the Above Entitled Court:

Appellants and defendants above named have heretofore filed with the Clerk of the District Court a statement of points on appeal, and said statement of points on appeal has been embodied in the Clerk's Transcript. To avoid duplication, Appellants hereby refer to and adopt such statement of points as the statement of points upon which they intend to rely upon this appeal.

Dated: This 19th day of September, 1946.

McLAUGHLIN, MCGINLEY & HANSON

By James A. McLaughlin

Attorneys for Defendants and Appellants William Shubin,
Frederick Alexander Shubin, and Jack L. Kissel

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sep. 20, 1946. Paul P. O'Brien,
Clerk.

